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Seow Hoon Hin v Hartalega Holdings Bhd & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)-102–01 OF 2015
TENGKU MAIMUN, ZALEHA YUSOF AND MARY LIM JJCA
21 JUNE 2019

C *Limitation — Accrual of cause of action — When cause of action accrued — Whether plaintiff's several causes of action against defendants were all time-barred under s 6 of the Limitation Act 1953 — Whether plaintiff's attempt to avoid limitation by pleading breach of trust against defendants failed — Whether plaintiff could not prove existence of any trust — Whether plaintiff*
D *failed to clearly identify property that was subject to any trust or to the tort of conversion*

The instant appeal was against the High Court's dismissal, after full trial, of the appellant's claims against the respondents for various declaratory orders and
E damages principally for breaches of trust, fiduciary and statutory duties and contract, negligent misstatement and the tort of conspiracy to injure. The appellant's case was that sometime in 1990, when he was running a factory making rubber gloves, the third respondent ('D3') suggested to him that they enter into a joint-venture ('JV') to make rubber gloves. At the time, D3 and the
F fourth and fifth respondents were the majority shareholders and directors of the second respondent ('D2'), which was also in the business of making rubber gloves. D2 was the wholly-owned subsidiary of the first respondent. The appellant said he agreed to the JV which involved the appellant's company and D2 transferring their respective manufacturing plants to the proposed JV
G entity. However, that new entity never materialised. Instead, the appellant shut down his factory and transferred his manufacturing plant to D2's factory. In return for his capital contribution, the appellant was allotted 174,000 new shares in D2 which represented 20% of its paid-up capital. The appellant claimed that at the time he transferred his production lines to D2, he had
H handed over to D2/D3 for safekeeping/temporary storage, equipment ('the Nanyang equipment') that he had previously bought for the purpose of installing two more production lines in his factory. The appellant said he subsequently discovered that, without his permission, the Nanyang equipment had been used to set up more manufacturing lines in D2's factory; that,
I accordingly, D2 and D3 had committed breach of trust over the Nanyang equipment and/or had converted the said equipment for their use and derived profits thereby. The appellant's claims against D2 and D3 in respect of the Nanyang equipment were premised on breaches of trust and fiduciary duties and an account of the profits made by D2 from converting the said equipment

to its use. The appellant also claimed that D3, D4 and D5 conspired to drastically dilute his shareholding in D2 through a rights issue of shares in D2 in 1994 and 1997, a special issue of shares in 2004 and a listing exercise in 2008. The appellant also claimed against D2 and D3 for payment of unpaid dividends owing to him for the years ending 1997, 1998 and 2003 totaling RM488,765.25. The respondents denied all allegations and claims made by the appellant, inter alia, on the grounds of limitation and estoppel and also on the ground that whatever actions that were taken by the respondents were bona fide, proper and valid in law and authorised by the board of directors of D2. In their pleaded defence, the respondents gave an entirely different narrative of how the appellant came to be involved with them including that there was never any proposed JV between the appellant and D2; that the appellant was given 174,000 shares in D2 in consideration for transferring his company's production lines to D2; that the Nanyang equipment was never delivered to the respondents; that there was never any intention to make the respondents trustees in respect of any property nor was there any conspiracy between D3, D4 and D5 to dilute the appellant's shareholding in D2.

Held, unanimously dismissing the appeal and affirming the High Court's decision:

(1) On the ground of limitation alone, the appeal had to be dismissed as the appellant's respective causes of action arose more than six years before the claim was filed in the year 2011 (see para 220).

(2) The claim for non-payment of dividends for the years ending 1997, 1998 and 2003 were clearly time-barred and were rightly dismissed by the trial judge. Dividends were contractual debts owed by the company and any claims in respect of them had to be filed within six years from the date of accrual of the cause of action as provided under s 6 of the Limitation Act 1953 ('the LA'). Any claim for the return of the Nanyang equipment, if it existed in the first place, was also time-barred as the claim was only made in 2011, long after limitation under s 6 of the LA had set in. Similarly, the claim against D3, D4 and D5 for the tort of conspiracy to injure, in that they conspired to dilute the appellant's shareholding in D2, was not only unproven but was time-barred, along with the claim for accounts, under s 6 of the LA as the factual matrix for the claims related to events that happened between 1994 and 2004 (see paras 167, 181–182 & 209–219).

(3) The appellant could not rely upon s 22 of the Limitation Act 1953 to avoid limitation as he failed to establish the existence of any trust. To assert that a trust existed in respect of the Nanyang equipment, or to claim for the tort of conversion of that property, there had to be established, among other things, a clear certainty of the property concerned. What exactly was the Nanyang equipment was not properly

identified by the appellant. Reliance upon transport documents evidencing the delivery of containers to D2's premises purportedly containing the Nanyang equipment was insufficient. Just because there was proof of receipt by D2 of the containers did not mean there was delivery of the Nanyang equipment since the delivery and the contents of the containers were disputed. The appellant had no personal knowledge of what was in the containers since he had left everything to the transport companies to handle. The appellant's conduct in not asking for the return of the Nanyang equipment, or to raise the issue contemporaneously, especially by way of a written or formal demand two years later, after he returned from abroad — and instead making his claim for the equipment some 18 years later — confirmed the respondents' contention that this claim was a non-starter. The appellant's claims both in relation to the return of the Nanyang equipment and for the tort of conversion failed not only because of the appellant's inability to establish the certainty of the subject-matter but also on the ground of limitation (see paras 130, 133–135, 144, 146, 151, 164, 167 & 169–172).

(4) D2's rights issues of 1994 and 1997, the special issue of 2004 and the listing exercise in 2008 were all regularly and properly within the mandate and authority of D2 and its board of directors to make under article 57 of the Articles of Association and s 132D of the Companies Act 1965. More importantly, those exercises were actions taken after valid resolutions authorising them had been passed at the relevant EGMs and were decisions of business judgment made by properly convened meetings of the board of directors and the EGMs. Such resolutions, until dissolved, cancelled or annulled, were valid and binding. Much of the appellant's complaints were of his own doing. The proportion and reduction of his shareholding had absolutely nothing to do with the respondents' actions but were entirely the result of his own acts, defaults, omissions and conscious decisions (see paras 196 & 202).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap penolakan oleh Mahkamah Tinggi, selepas perbicaraan penuh, tuntutan perayu terhadap pelbagai perintah deklarasi dan ganti rugi bagi pecah amanah, tugas fidusiari dan statutori dan kontrak responden-responden, kecuaian salah nyata dan tort konspirasi untuk merugikan. Kes perayu adalah pada sekitar 1990, apabila beliau menjalankan sebuah kilang menghasilkan sarung tangan getah, responden ketiga ('D3') mencadangkan beliau untuk memasuki usaha sama ('JV') untuk menghasilkan sarung tangan getah. Pada masa material, D3 dan responden keempat dan kelima adalah pemegang saham terbesar dan pengarah kepada responden kedua, yang mana juga menjalankan perniagaan menghasilkan sarung tangan getah. D2 adalah anak syarikat yang dimiliki sepenuhnya oleh responden pertama. Perayu menyatakan beliau bersetuju kepada JV yang melibatkan

syarikat perayu dan D2 memindahkan loji pembuatan masing-masing kepada entiti JV yang telah dicadangkan. Walaubagaimanapun, entiti baru tersebut tidak pernah direalisasikan. Sebaliknya, perayu menutup kilang beliau dan memindahkan loji pembuatan kepada kilang milik D2. Sebagai balasan kepada sumbangan modal beliau, perayu telah diperuntukkan oleh 174,000 saham baru di dalam D2 yang mewakili 20% modalnya yang telah dibayar. Perayu mendakwa bahawa semasa beliau memindahkan saluran pengeluaran kepada D2, beliau telah memberikan kepada D2/D3 untuk dijaga/penyimpanan sementara, peralatan ('peralatan Nanyang tersebut') yang sebelum ini telah dibeli oleh beliau untuk tujuan memasang dua lagi saluran pengeluaran di kilang beliau. Perayu menyatakan bahawa beliau seterusnya mendapat tahu, tanpa kebenaran beliau, peralatan Nanyang tersebut telah digunakan untuk memasang saluran pembuatan di kilang D2; yang mana, D2 dan D3 telah melakukakan pecah amanah terhadap peralatan Nanyang tersebut dan/atau menukar peralatan tersebut untuk kegunaan mereka dan mendapat keuntungan. Tuntutan perayu terhadap D2 dan D3 berkenaan dengan peralatan Nanyang adalah berlandaskan kepada pecah amanah dan tugas-tugas fidusiari dan akaun keuntungan yang dibuat oleh D2 dalam menukar peralatan tersebut untuk kegunaan mereka. Perayu juga mendakwa bahawa D3, D4 dan D5 telah membuat konspirasi untuk secara drastiknya mencairkan pemegangan saham beliau di dalam D2 melalui hak pengeluaran saham di D2 pada 1994 dan 1997, pengeluaran saham istimewa pada 2004 dan penyenaraian pada 2008. Perayu juga menuntut terhadap D2 dan D3 untuk pembayaran dividen yang tidak dijelaskan kepada beliau untuk tahun berakhir 1997, 1998 dan 2003 berjumlah RM488,765.25. Responden-responden menafikan segala dakwaan dan tuntutan yang dibuat oleh perayu, antara lain, atas alasan had dan estoppels dan juga alasan apa-apa tindakan yang diambil oleh responden telah dibuat secara suci hati, betul dan sah di sisi undang-undang dan telah diluluskan oleh lembaga pengarah D2. Di dalam pembelaan mereka, responden memberikan naratif yang sama sekali berbeza dengan bagaimana perayu boleh terlibat dengan mereka termasuklah tidak pernah ada sebarang cadangan JV di antara perayu dan D2; perayu diberikan 174,000 saham di dalam D2 sebagai balasan memindahmilik saluran pengeluaran syarikat beliau kepada D2; peralatan Nanyang tidak pernah dihantar kepada responden; tidak pernah ada sebarang niat untuk melantik responden sebagai pemegang amanah harta dan tidak ada sebarang kospirasi di antara D3, D4 dan D5 untuk mencairkan pegangan saham perayu di dalam D2.

Diputuskan, menolak rayuan dan mengesahkan keputusan Mahkamah Tinggi:

(1) Atas alasan had masa sahaja, rayuan haruslah ditolak kerana kausa tindakan perayu dibangkitkan lebih daripada enam tahun sebelum tuntutan dibuat pada tahun 2011 (lihat perenggan 220).

(2) Tuntutan untuk dividen yang tidak dibayar pada tahun berakhir 1997, 1998 dan 2003 adalah jelas dihalang oleh had masa dan telah dengan tepat ditolak oleh hakim perbicaraan. Dividen adalah hutang kontrak oleh syarikat dan sebarang tuntutan terhadapnya haruslah difailkan dalam masa enam tahun daripada tarikh terakrunya kausa tindakan seperti yang dinyatakan di bawah s 6 Akta Had Masa 1953 ('AHM'). Sebarang tuntutan untuk pemulangan semula peralatan Nanyang, sekiranya ia wujud, adalah terhalang oleh had masa kerana tuntutan hanya dibuat pada tahun 2011, lama apabila had masa di bawah s 6 AHM terpakai. Begitu juga, tuntutan terhadap D3, D4 dan D5 untuk tort konspirasi untuk mencederakan, di mana mereka berkonspirasi untuk mencairkan pegangan saham perayu di dalam D2, bukan sahaja tidak dibuktikan malahan terhalang oleh had masa, bersama dengan tuntutan akaun, di bawah s 6 AHM kerana factual matriks untuk tuntutan berkait dengan kejadian yang berlaku pada 1994 dan 2004 (lihat perenggan 167, 181–182 & 209–219).

(3) Perayu tidak boleh bersandarkan kepada s 22 Akta Had Masa 1953 untuk mengelak had masa dan gagal untuk menyatakan sebarang kewujudan amanah. Untuk menegaskan kewujudan amanah terhadap peralatan Nanyang, atau menuntut untuk tort penukaran harta, perlulah membuktikan, antara lain, kepastian dengan jelas harta berkenaan. Apa sebenarnya peralatan Nanyang tidak pernah dikenalpasti oleh perayu. Kebergantungan terhadap dokumen pengangkutan membuktikan penghantaran bekas ke premis D2 kononnya mengandungi peralatan Nanyang tidak mencukupi. Hanya kerana terdapat bukti resit oleh D2 terhadap bekas tersebut tidak bermakna terdapat penghantaran peralatan Nanyang memandangkan penghantaran dan kandungan bekas itu adalah dipertikaikan. Perayu tidak mempunyai sebarang pengetahuan peribadi apa yang ada di dalam bekas tersebut memandangkan beliau menyerahkan kepada syarikat pengangkutan untuk dikendalikan. Tindakan perayu dalam tidak meminta kembali peralatan Nanyang, atau membangkitkan isu tersebut secara serentak, terutamanya secara bertulis atau tuntutan rasmi dua tahun kemudian, selepas pulang dari luar negara — dan sebaliknya dari membuat tuntutan terhadap peralatan 18 tahun kemudian — membuktikan bahawa tuntutan beliau adalah bukan permulaan. Tuntutan perayu terhadap kedua-dua pemulangan peralatan Nanyang dan tort penukaran gagal bukan sahaha kerana ketidakupayaan perayu untuk membuktikan kepastian perkara utama tetapi juga atas alasan had masa (lihat perenggan 130, 133–135, 144, 146, 151, 164, 167 & 169–172).

(4) Hak pengeluaran oleh D2 pada 1994 dan 1997, pengeluaran istimewa 2004 dan penyenaraian 2008 semuanya adalah bertepatan dan betul sepertimana mandat dan kuasa D2 dan lembaga pengarahnya yang dibuat di bawah artikel 57 undang-undang syarikat dan Akta Syarikat

1965. Yang paling penting, tindakan yang diambil adalah selepas resolusi sah yang memberikan mereka kuasa telah diputuskan pada EGMs dan keputusan adalah pertimbangan perniagaan yang dibuat dengan mengadakan mesyuarat ahli lembaga pengarah dan EGMs. Resolusi tersebut, apabila dibubarkan, dibatalkan atau dimansuhkan adalah sah dan mengikat. Sebarang dakwaan oleh perayu adalah perbuatan beliau sendiri. Pengkadaran dan pengurangan pegangan saham beliau tidak ada kena mengena dengan tindakan responden tetapi adalah sepenuhnya disebabkan oleh tindakan beliau sendiri, kemungkiran, kelalaian dan keputusan yang dibuat secara sedar (lihat perenggan 196 & 202).]

Notes

For cases on when cause of action accrued, see 9 *Mallal's Digest* (5th Ed, 2018 Reissue) paras 2339–2342.

Cases referred to

Ang Koon Kau & Anor v Lau Piang Ngong [1984] 2 MLJ 277, FC (refd)
BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd and another action [1996] 1 MLJ 872; [1996] 1 AMR 1144, HC (refd)
Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (refd)
Bolton (HL) (Engineering) Co Ltd v TJ Graham & Sons Ltd [1957] 1 QB 159, CA (refd)
Bounty Dynamics Sdn Bhd (formerly known as Media Development Sdn Bhd) v Chow Tat Ming & 175 Ors [2016] 1 MLJ 507, CA (refd)
Chan Thiam Teng v Ban Swee Heng Sdn Bhd [1992] 2 MLJ 583, HC (refd)
Cheong Yuk Wai v Low Sai Wee & Ors [2007] 2 MLJ 634, HC (refd)
Clemens v Clemens Bros Ltd & Anor [1976] 2 All ER 268, Ch D (refd)
Compania de Electricidad de la Provincia de Buenos Aires Ltd, Re [1978] 3 All ER 668, Ch D (refd)
Dato Wira A Nordin bin Mohd Amin & Ors v Rajoo a/l Selvappan & Ors [2007] 5 MLJ 297; [2007] 1 MLRA 594, CA (refd)
ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd [2005] 2 MLJ 422, CA (refd)
Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soh Yuh Mian, intervener) [2011] 4 MLJ 173, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1, FC (refd)
Govinda Mudaliar Sons v Govindasamy [1967] 2 MLJ 5 (refd)
Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals [2015] 1 MLJ 773, FC (refd)
Guthrie Landscaping Sdn Bhd v Hasrat Usaha Sdn Bhd [2011] 4 MLJ 121, HC (refd)

Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors [2011] 3 CLJ 861, CA (refd)
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1963] 2 All ER 575, HL (refd)
Kamla Lal Hiranand v Harilela Padma Hari and Others [2000] SGCA 40, CA (refd)
Khutubul Zaman @ Khutubul Jaman bin SNS Bukhari & Anor v TJB Development Sdn Bhd & Anor [2009] 7 MLJ 314, HC (refd)
Koh Siew Keng (P) & Anor v Koh Heng Jin [2008] 3 MLJ 822; [2008] 3 CLJ 450, CA (refd)
Lonrho plc v Fayed [1992] 1 AC 448, HL (refd)
Meinhard v Salmon et al 164 NE 545 (NY 1928), CA (refd)
Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners) [2007] 5 MLJ 501; [2007] 4 CLJ 725, FC (refd)
Nagase Singapore Pte Ltd v Ching Kai Huat and others [2008] 1 SLR 80, HC (refd)
National Chemsearch Corpn (SEA) Pte Ltd & Anor v Hotel Ambassador (Malaysia) Sdn Bhd [1975] 2 MLJ 193, FC (distd)
Newacres Sdn Bhd v Sri Alam Sdn Bhd [1991] 3 MLJ 474, SC (refd)
OSK Trustees Bhd & Anor v Metroplex Holdings Sdn Bhd [2019] MLJU 76; [2019] 1 LNS 3, CA (refd)
Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor [2006] 1 MLJ 97, CA (refd)
Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals [2010] 5 MLJ 394, CA (refd)
SCK Group Bhd & Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393; [2010] 9 CLJ 389, CA (refd)
SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor [2016] 1 MLJ 464, FC (refd)
Salomon v A Salomon & Co Ltd [1897] AC 22, HL (refd)
Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785, FC (refd)
Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors [1994] 3 MLJ 185, SC (refd)
Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim [2015] 3 MLJ 609, FC (refd)
Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd [1998] 1 MLJ 697, HC (refd)
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229, FC (refd)
Yeng Hing Enterprise Sdn Bhd v Liow Su Fah [1979] 2 MLJ 240, FC (refd)
Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614, SC (refd)

Legislation referred to

Capital Markets and Services Act 2007 ss 177, 179, 214, 357
Companies Act 1965 ss 132D, 163(4)

Evidence Act 1950 ss 101, 102
Limitation Act 1953 ss 6, 22, 22(1)(b)
Wills Act [SG]

Appeal from: Civil Suit No 22NCC-368 of 2011 (High Court, Kuala Lumpur)

Gopal Sri Ram (Lim Choon Khim, Chuah Yih Chuan and David Yii with him) (Chooi, Saw & Lim) for the appellant.
S Sivaneindiren (Peter Skelchy and Jeff Ong Sze Ren with him) (Cheah, Teh & Su) for the first, second and third respondents.
John Skelchy (Vishal Kumar with him) (James Monteiro) for the fourth respondent.
Lim Bee Leong (KY Lim & Churme) for the fifth respondent.

Mary Lim JCA (delivering judgment of the court):

[1] The appellant's claim against all five respondents at the High Court was dismissed after a full trial. If he is successful before us, his claim will have to be remitted to the High Court for assessment of damages.

[2] The parties will be referred to as they were before the High Court. The plaintiff claimed that the five defendants are in breach of trust, breach of fiduciary duty, breach of contract, and had conspired to injure him and has sought various declaratory orders and damages against them, individually and separately, and jointly and severally.

THE PARTIES

[3] The first defendant, Hartalega Holdings Bhd, is a company that has been listed on the Main Board of the Kuala Lumpur Stock Exchange since 17 April 2008. It was incorporated on 24 July 2006.

[4] The second defendant, Hartalega Sdn Bhd was incorporated on 12 September 1981. Its main activity is the production of rubber gloves. It has been producing rubber gloves since 1989. On 7 May 2007, it became a wholly owned subsidiary of the first defendant.

[5] The third and fourth defendants, who are brothers, together with one Wong Kin Seng @ Wong Kim Seng ('Wong') and the fifth defendant are majority shareholders and directors of the second defendant. The fifth defendant however retired as director in 2009. The third defendant has been a director of the second defendant since 31 October 1987. When the second defendant was incorporated, the third defendant held 3,577,306 (22.8%) shares of its issued capital. The fourth defendant on the other hand, holds

2,811,919 (17.9%) shares in the second defendant. The third defendant is also a shareholder of the first defendant, and has been its director and managing director since 7 May 2007.

[6] The plaintiff is a shareholder of the first defendant. But, that was not how it started.

THE PLAINTIFF'S CASE

[7] The facts relating to the plaintiff's claims go back to 1990. They are fairly detailed and require setting out.

[8] According to the plaintiff, sometime that year, the third defendant together with Wong, the second defendant's employee visited him at his factory in Petaling Jaya. At that time, the plaintiff was a director and shareholder of MLB Sdn Bhd ('MLB'), a company that manufactured latex examination gloves ('rubber gloves'). MLB had two manufacturing lines that used the hot oil boiler heating system in the drying process to manufacture the rubber gloves.

[9] The plaintiff claimed that the third defendant showed keen interest in the plaintiff's boiler system leading to both the plaintiff and the third defendant agreeing to a joint venture whereby the plaintiff would, as his capital contribution, transfer his two manufacturing lines with the boiler system to a proposed joint venture entity. The third defendant's contribution was the transfer of one existing manufacturing line installed at the second defendant's factory, to the new entity. The plaintiff claimed that the third defendant further agreed that the plaintiff was to have 49% shareholding in the new entity.

[10] The plaintiff claimed that in July 1990 and on the suggestion of the third defendant, he gave up his business premises in Petaling Jaya and he relocated his two manufacturing lines to the second defendant's premises in Kepong. The plaintiff claimed that at the same time as relocating his two manufacturing lines, he had also handed over spare parts for two incomplete production lines that MLB had purchased from Nanyang Chemical Co ('Nanyang equipment') for temporary storage. The plaintiff claimed that because this equipment was incomplete, he intended to return them to Nanyang and seek a reimbursement of RM250,000 since his production line had closed.

[11] The plaintiff claimed that relying on the third defendant's representation that he will keep the equipment in the custody and control of the second defendant, he had, through the third defendant, handed over the Nanyang equipment to the second defendant. The Nanyang equipment were placed in containers and delivered to the third defendant's custody at the

second defendant's factory in Kepong. In support of such delivery, the plaintiff tendered invoices which carried the acknowledgement of receipt signed by the third defendant's sister who was the second defendant's company secretary. It is the plaintiff's case that the second and third defendants were trustees or constructive trustees of the Nanyang equipment for which he was the beneficial owner.

[12] In 1992, the plaintiff went to the second defendant's new factory at Batang Berjuntai to take back the Nanyang equipment. There, he discovered that there were five production lines at the second defendant's factory. He surmised that one of the production lines was the second defendant's; two were his; and the remaining two were his Nanyang equipment which he now goes on to describe as the 'Nanyang lines'.

[13] The plaintiff claimed that the second defendant, acting by the third defendant, had in 'flagrant breach of trust' utilised, inter alia, the Nanyang lines to assemble another two manufacturing lines for the manufacture of the rubber gloves utilising the same hot oil boiler system as the plaintiff. The plaintiff claimed that the Nanyang lines were handed over to the third defendant for safe keeping but were instead installed by the third defendant in the second defendant's factory without his permission.

[14] The plaintiff claimed that the third defendant is in breach of his promise to him by not setting up the separate entity, that the third defendant instead caused the second defendant to issue to the plaintiff in 1991, 174,000 new shares as his capital contribution having regard to the relocation of his two manufacturing lines to the second defendant. This allotment represented 20% of the second defendant's paid up capital while the third defendant, his nominees and the fourth defendant held 70.4% of the issued shares in the second defendant.

[15] It is the plaintiff's case that the second defendant, as trustee of the Nanyang lines had in breach of the trust, converted the same for their use and had acquired proceeds and/or profits from the assembly of the Nanyang lines for an additional two lines of production. Consequently, the second defendant had acted dishonestly, had been unjustly enriched and continued to be unjustly enriched; and must now be accountable to the plaintiff for all the proceeds and/or profits which the second defendant, as his trustee, had made from the conversion.

[16] It is the further allegation of the plaintiff that the third defendant has knowingly assisted in the breach of trust as he:

A (a) knew that the Nanyang equipment were subject to a fiduciary duty by the second defendant;

(b) assisted in the second defendant's breach of fiduciary duty; and

(c) was dishonest in knowingly assisting the said breach of fiduciary duty.

B

[17] The next principal allegation of the plaintiff concerns a dilution of his shareholding in the second defendant.

C **[18]** On 19 August 1994, at an EGM of the second defendant, it was resolved and passed to increase the paid up capital of the second defendant by way of a rights issue of new ordinary shares to members on the basis of four new ordinary shares for every five existing shares held at an issue price of RM1.10 per share at a date to be determined by the directors. It was also resolved that for the rights entitlement of Wong, director, to apply for 155,904 new ordinary D shares, approval be given to him to subscribe for his rights entitlement, either partially or wholly at any time over a period of 24 months.

[19] The plaintiff's claim is that this rights issue was carried out for the E dominant purpose of diluting his shareholding in the second defendant as the second defendant had sufficient funds for its business operations and expansion. He also did not profit from the exercise. At the material time, the plaintiff's shares were said to be valued at RM1.30 per share but the offer price of the rights issue was at RM1.10 per share, a value which the plaintiff alleged was an undervalue. F

[20] The plaintiff nevertheless subscribed for 389,760 shares amounting to RM428,736. Three cheques were forwarded in payment for the subscription. One of the three cheques was however, not cleared; the plaintiff claimed it was G due to a clerical error.

[21] That cheque was returned vide letter dated 13 October 1994 by the second defendant's company secretary. No replacement cheque was requested. Regardless, the plaintiff claimed that he had informed the company secretary H that he would resolve the problem.

[22] The plaintiff alleged that at the behest of the third defendant, the company secretary informed the plaintiff vide a 'backdated letter dated 13 October 1994', that since rights issue must be paid on time, as a result of his I default, his rights entitlement was accordingly reduced. Consequently, the plaintiff claimed that he was deprived from acquiring 181,578 shares in the second defendant.

[23] With this exercise, the plaintiff's shareholding in the second defendant

was reduced from 20% to 16.27%. The plaintiff claimed that the rights issue was, 'discriminatory' as the time frame given for the subscription varied from shareholder to shareholder.

[24] The 181,578 shares were subsequently taken up by the third defendant. The plaintiff claimed that this was wrongful, that the third defendant held these shares as a constructive trustee for him and that the third defendant was therefore liable to account to him for the gain made together with all dividends paid on these shares.

[25] The next issue concerned the proposed listing of the second defendant on the Second Board of the KL Stock Exchange in 1996.

[26] In September 1995, the third defendant, as managing director of the second defendant informed all shareholders, including the plaintiff, of the proposal to list the second defendant on the KLSE. The plaintiff and other relevant shareholders were also informed by the third defendant that certain portions of their shares, 333,037 shares in the case of the plaintiff, had to be transferred to two Bumiputera investors, but the plaintiff will remain as beneficial owners of those transferred shares. In the event the listing failed, the shares would be retransferred to the original shareholders.

[27] The plaintiff, qua shareholder decided to participate in the exercise on the condition that the issue of his beneficial rights and 'his loss due to the dilution of his shareholding in 1994' was settled by the second and/or third defendants, prior to such listing. Towards this end, the plaintiff gave the third defendant a power of attorney and handed over the original share certificates of his shares. On 28 September 1995, the third defendant, as attorney, transferred the plaintiff's 333,037 shares in the second defendant and on 20 October 1995, the shares were registered as follows:

(a) 184,300 shares to one Ashaari bin Ramli; and

(b) 148,737 shares to one Azman bin Dahlan.

[28] The plaintiff's complaint here is that when the listing was aborted, his shares were not retransferred back to him until 20 March 2000. Since he remained the beneficial owner of the shares, he was entitled to dividends from 31 March 1997–31 March 2000.

[29] The plaintiff relied on the draft working paper dated 20 March 1996 prepared in anticipation of the listing exercise which purportedly showed the plaintiff had 695,382 shares representing 16.27% of the issued share capital in the second defendant. Thus, he was supposed to receive 2,224,662 shares in the new public listed company upon listing.

A **[30]** The plaintiff gave his version as to why the listing exercise was aborted. At para 15.9 of the amended claim, he claimed that he had requested the third defendant to settle the issue of his beneficial rights and loss due to the dilution of shares in 1994. Until that was resolved, he would not sign the statutory declaration required of the shareholders for the listing exercise. The plaintiff B claimed that the third defendant had represented and/or promised the plaintiff that he would be compensated accordingly.

[31] Despite this representation, by letter dated 29 October 1996, the third C defendant demanded the plaintiff to execute the statutory declaration by 5pm of 1 November 1996 failing which the plaintiff would be deemed no longer interested in the listing exercise and that his shareholding would not be included in any restructuring exercise carried out to facilitate the completion of the listing. The plaintiff did not sign the declaration and at an EGM of the second defendant held on 5 December 1996, it was decided that the plaintiff's D refusal left the members no alternative but to abandon the listing exercise. The plaintiff claimed that that was an irrational conclusion, that it was the third defendant's willful refusal to resolve the issues mentioned by the plaintiff that was the cause of the abandonment of the listing exercise.

E **[32]** In May 1997, the share certificates were returned to the plaintiff. On 15 October 1999, the plaintiff took steps to retransfer his 333,037 shares into his name. That was effected on 20 March 2000. Be that as it may, the plaintiff claimed to be the legal and beneficial owner of 695,382 shares in the second F defendant, as shown in the draft working paper.

[33] The next complaint relates to claims of unpaid dividends totaling RM488,765.25. It is the plaintiff's claim that due to the discrepancies in the payments of dividends to him, there is now this outstanding sum which G remains unpaid. The plaintiff claimed that the second defendant now holds the aggregate of these unpaid dividends on trust for him. The plaintiff has also turned to the third defendant to recover this payment, claiming that the third defendant is equally liable as constructive trustee and because he knowingly assisted the second defendant, the trustee of the unpaid dividends in H withholding such payments, breaching its fiduciary duty to the plaintiff and was dishonest in knowingly assisting that breach of fiduciary duty.

[34] Moving on to the next complaint, that there was a further dilution of his shareholding, this time in 2005.

I **[35]** At para 17.4 of the amended statement of claim, the plaintiff alleged that at the behest of the third defendant, an EGM was held on 9 May 1997 where it was resolved that the authorised share capital of the second defendant be increased from RM10m to RM25m. It was further resolved that approval be

given to the directors of the second defendant to issue 6,557,198 ordinary shares of RM1 each by way of provisional allotment to registered shareholders on the basis of three new ordinary shares for every two existing ordinary shares held.

[36] At this point in time, the plaintiff's 333,037 shares had yet to be reregistered in his name. The plaintiff claimed that the issuance of the new shares was an attempt and a collusion by the third to the fifth defendants to further dilute his shareholding in the second defendant as such issue was unnecessary given that the second defendant had sufficient funds for its operational and expansion needs; that the third defendant's failure to retransfer his shares was in order to deny him, the plaintiff, the right to take up the new shares based on his shareholding.

[37] Because the plaintiff dissented to the resolutions at the EGM, the plaintiff did not take up the rights issue. This resulted in a dilution of his shareholding from 16.27% to 6.28%. The plaintiff is claiming compensation for this loss.

[38] The plaintiff further claimed that he was wrongfully deprived the right to take up new shares which were issued pursuant to a resolution passed at an EGM held on 6 August 2004. At this EGM, it was resolved that approval be given to the directors of the second defendant to allot and issue 4,720,000 new shares at the price of RM3.80 per share by way of a special issue to such investors identified by the directors of the second defendant from time to time and upon such terms and conditions as the directors of the second defendant may deem fit. These 4,720,000 new ordinary shares in the second defendant shall upon allotment and issue rank parri passu in all respects with the existing ordinary shares in the second defendant.

[39] Despite the plaintiff's proxy questions and objection on the proposed resolution at the EGM, the resolution was carried. The plaintiff claims that the resolution is null and void and of no legal effect as it contravenes the provisions of the Companies Act 1965; alternatively, the offer given orally to the proxy did not constitute a valid offer.

[40] Once again, the plaintiff alleged that this allotment was not for the benefit of the second defendant. Rather, it was part of the conspiracy and for the collateral and predominant purpose of the third to the fifth defendants to injure the plaintiff by shifting voting control and further diluting the plaintiff's shareholding in the second defendant from 6.28% to 4.43%.

[41] The final allegation concerns the listing of the first defendant on Bursa Malaysia Securities Bhd.

A **[42]** At the EGM of 15 March 2006, a resolution was carried which in essence gave approval to the second defendant to undertake and implement a proposed scheme for the proposed listing of the second defendant on Bursa Malaysia Securities Bhd and that the directors and/or managing director be authorised to do all acts, deeds and things necessary to give effect to and
B complete the proposed scheme. The plaintiff participated in the exercise.

[43] On 22 September 2006, the plaintiff was informed by the second defendant's company secretary that a meeting was scheduled for 28 September
C 2006 wherein merchant bankers and relevant advisors would attend and provide details to the shareholders of the second defendant on the sale of their shares in the second defendant to a purchaser on reconstruction. The third defendant facilitated the incorporation of the first defendant on 24 July 2006 as a holding investment company or vehicle to acquire all the shares of the
D second defendant from its shareholders with shares in the first defendant in exchange but leaving a portion of the shares of the first defendant offered to the public upon listing.

[44] According to the plaintiff, there were 16 such shareholders inclusive of
E the plaintiff. The price of shares in the second defendant was said to be at RM7.90 per share while the shares in the first defendant was at the value of RM0.50 per share.

[45] The third defendant is alleged to have informed all the shareholders that
F they were required to execute a sales and purchase agreement prepared by Messrs Lee Pereira & Tan for this purpose on the same day.

[46] On 28 September 2006, with a strict reservation of his rights, the
G plaintiff executed such an agreement. On 2 April 2007, the plaintiff's solicitors confirmed delivery of the plaintiff's share certificates to Messrs Lee Pereira & Tan with the plaintiff's reservations.

[47] According to the listing prospectus of the first defendant dated
H 28 March 2008, 10% of the issued capital of the first defendant would, prior to listing, be offered for sale commencing 28 March 2008 and closing on 7 April 2008 for listing scheduled on 17 April 2008. 5% of the issued capital would be offered for sale whilst another 5% would be reserved for sale to two categories: 1.65% would be reserved for application by eligible directors, employees of the
I Group and persons who had contributed to the success of the Group; whilst 3.34% would be placed out to identified investors by way of private placement. For the persons in the earlier category, the decision to allocate shares to them would be deferred until after the closing date in the event that the applications

for shares exceed the availability for all applications received before 5pm on 7 April 2008 and thereafter adopting the reasonable criteria on who was to take precedence.

[48] The plaintiff claimed that he is one of the persons identified as having contributed to the success of the Group. He further claimed that pursuant to the agreement and prior to the listing of the first defendant, he received 10,745,000 shares in the first defendant representing 4.43% of the share capital in the first defendant.

[49] Relying on the information contained in the listing prospectus and the collective and individual assumption of responsibility for the accuracy of that information by the directors of the second defendant, by letter dated 1 April 2008, the plaintiff notified the Board of Directors of the first defendant that he wished to apply to purchase the ordinary shares of the first defendant at RM1.80 per share and that he was entitled to do so under the category of persons who had contributed to the success of the Group and as an identified investor for private placement.

[50] Vide letter dated 3 April 2008 from the underwriters of the listing, the plaintiff was notified that the first defendant had offered to place the plaintiff as an identified investor and that he was offered 500,000 offer shares at RM1.80 per share for the total consideration of RM900,000. The plaintiff duly paid this consideration and was allotted these 500,000 shares.

[51] By letter dated 7 April 2008 sent to the Board of Directors of the first defendant prior to closing cut off time, the plaintiff applied for an additional two million shares under the same category as stated in his earlier letter of 1 April 2008. A bankers' cheque of RM3.6m was sent to the underwriters by 12.20pm on 7 April 2008. He was however, informed by the underwriters that places for private placement had already been identified and in the event these were taken up, his bankers' cheque would be returned.

[52] On 8 April 2008, the plaintiff was informed that all private placement shares had been taken up. On 9 April 2008, the plaintiff sent a bankers' cheque for RM3.6m registering his protest to being refused additional shares as the underwriters' letter of 8 April 2008 made no mention of those who had contributed to the success of the group.

[53] By letter dated 11 April 2008, the Board of Directors informed the plaintiff that all private placement shares had been taken up by 5pm on 7 April 2008 and the plaintiff's bankers' cheque was returned. By letter dated

16 August 2010, the plaintiff reiterated to the Board of Directors his protest which he wanted read at the EGM of the first defendant scheduled for 18 August 2010.

[54] The plaintiff specifically alleged that the third defendant, as the directing mind and will of the first defendant had de facto control of the Board of Directors of the first defendant, and '... for the predominant purpose of keeping substantial portions of the private placement shares with nominees to the exclusion of bona fides investors like the plaintiff, did so for the collateral purpose of wresting voting control' in the first defendant and rights accruing on the said shares; consequence of which is loss and damage to the plaintiff.

[55] The plaintiff claimed that the prospectus was misleading and contained negligent misstatements; that he, as an existing shareholder had relied on the representations in the listing prospectus to apply for the additional shares. The representations and statements are alleged to have turned out to be untrue.

[56] The plaintiff is thus suing the defendants jointly and severally, that they should be accountable to him for his beneficial rights in respect of all proceeds and/or profits which the second defendant and/or the third defendant as the plaintiff's trustee had made from the conversion of the Nanyang equipment together with the dividends that have remained unpaid to date. He has also sought specific remedies against particular defendants aside from a claim of compensation from all the defendants for his loss of shares:

(a) against the first and third defendants:

(i) damages for negligent misstatement;

(ii) alternatively, damages for breach of statutory duty pursuant to ss 177, 179 and 357 of the Capital Markets and Services Act 2007 read together with, inter alia, s 214 of the Capital Markets and Services Act 2007; and

(iii) interest on the damages ordered;

(b) against the second defendant:

(i) declaration that the second defendant is a trustee for the proceeds and/or profits made from the benefit and use of the Nanyang equipment;

(ii) declaration that the second defendant is a trustee for the unpaid dividends amounting to RM488,765.25 due and owing to the plaintiff;

(iii) an order that the second defendant account to the plaintiff for the proceeds and/or profits made from benefit and use of the Nanyang

equipment and make restitution of the same to the plaintiff;

(iv) an order that the second defendant account to the plaintiff for the dividends as aforesaid and make restitution of the same to the plaintiff;

(v) accounts and enquiries; and

(vi) interest on the profits and dividends;

(c) against the third defendant:

(i) declaration that the third defendant is a constructive trustee for the proceeds and/or profits made from the benefit and use of the Nanyang equipment;

(ii) declaration that the third defendant is a constructive trustee for the unpaid dividends amounting to RM488,765.25 due and owing to the plaintiff;

(iii) equitable compensation for the proceeds and/or profits made from benefit and use of the Nanyang equipment;

(iv) equitable compensation for unpaid dividends amounting to RM488,765.25 due and owing to the plaintiff;

(v) damages for the tort of conspiracy to injure the plaintiff by depriving him of his right to subscribe for the additional two million shares in the first defendant during the public listing exercise in April 2008;

(vi) compensation for the loss of the value of the 181,578 shares in the second defendant;

(vii) an account of all dividends and other benefits that accrued to the third defendant from the 181,578 shares in the second defendant;

(viii) interest; and

(ix) exemplary damages;

(d) against the third — fifth defendants:

(i) damages for the tort of conspiracy to injure in respect of the allotment of 4,720,000 shares in the second defendant on 4 April 2005;

(ii) interest on such damages;

(iii) compensation for loss due to the wrongful allotment of the 4,720,000 shares in the second defendant on 4 April 2005;

(iv) damages for the tort of conspiracy to injure in depriving the plaintiff of his right to subscribe the additional two million shares

A in the first defendant during the public listing in April 2008; and

(v) exemplary damages.

THE DEFENDANTS' CASE

B

[57] Other than the first to the third defendants who filed a common defence, separate defences were filed by the fourth and fifth defendants. The learned judge has summarised the defences collectively at para 16 of her grounds. In this appeal, we will incorporate that summary when dealing with the defences in slightly more detail given the nature of the plaintiff's claims.

C

[58] The defendants' principal contentions are as follows. First, the allegations of conspiracy, conversion, claims of trust and/or trusteeship, non-payment of dividends, breach of statutory duties are all denied on the basis of the underlying factual arrangements or circumstances, estoppel, limitation, and that the decisions were all made on a majority/collective basis by the respective boards of the first and second defendants.

D

E

[59] On the position of the respective shareholding, the third defendant contended that save for the period between 31 October 1987 to 14 March 1988 when he acquired two promoter shares of the second defendant and after the listing of the first defendant on 17 April 2008, he denied being the majority shareholder of either the first or second defendants. Prior to 7 May 2007, the third to the fifth defendants also collectively never held the majority shares in the second defendant.

F

[60] As for how the parties met, the third defendant claimed that it was one Liew Ben Poh ('Liew'), an employee of the plaintiff who introduced them in 1989. Liew later approached the third defendant for help because the plaintiff had encountered production problems. The third defendant and Wong identified the plaintiff's problem as one of design of the assembly line itself, after visiting the plaintiff's factory premises at Section 51 Petaling Jaya. Apparently, the dipping bridge had a welded joint which caused vibration which in turn affected the production of the gloves. According to the third defendant, the assembly lines also should not have used glaze former or mould for producing gloves.

G

H

[61] On the matter of the closure of the plaintiff's factory, it is the third defendant's case that this had nothing to do with any joint venture agreement. Rather, it was precipitated by the plaintiff's own financial difficulties and business failure.

I

[62] The third defendant claimed that the joint venture was proposed not as between the plaintiff and the second defendant but it was between the plaintiff and a company known as Hartalega Industries Sdn Bhd. The intent was to set up a company known as Hartalega Rubber Products Sdn Bhd ('HRPSB'). HRPSB was supposed to take over the two assembly or production lines of the plaintiff and revive the closed down factory with the technical assistance and support of the third defendant and Hartalega Industries Sdn Bhd.

[63] The new entity did not come to pass. A second meeting followed on 12 April 1990 at the office of accountants, Raja Salleh, Lim & Co. The meeting discussed the possibility of a joint venture, this time with Hartalega Industries Sdn Bhd through a new entity, Hartalega Rubber Products ('HRP'). HRP will take over the plaintiff's production line.

[64] That joint venture was abandoned due to labour problems. According to the third defendant, it was thereafter and upon the plaintiff's request to invest in the second defendant that the plaintiff came to hold shares in the second defendant. Since the second defendant was an ongoing business, the request was taken up with the shareholders who agreed to the subscription in consideration of the plaintiff's transfer of the two production lines to the second defendant and the payment of cash.

[65] The second and third defendants contended that the plaintiff had agreed at the material time that he would, at his sole cost and expense, be responsible for the dismantling and reassembling of the two assembly or production lines at the second defendant's factory. While the plaintiff dismantled the two lines, he only reassembled one before he 'disappeared' and 'was nowhere to be seen'. The reassembled line was also without the required formers or moulds. The second line had to be reassembled by the second defendant and it too, was incomplete. The two lines turned out to be 'problematic from the start and could only operate after technical modifications were made, dysfunctional heaters replaced and the formers or moulds installed'.

[66] In relation to the Nanyang equipment or 'spare parts', the defendants denied any delivery of the equipment or that the plaintiff had entrusted them to the second defendant. The defendants added that even if the Nanyang equipment had been delivered to the second defendant, the existence of a trust, in any term or description, was denied. The defendants alleged that the claim was time-barred, whether founded in trust or conversion.

[67] On the allotment of shares, the defendants contended that the 174,000 shares allotted to the plaintiff was upon the plaintiff's request, as mentioned earlier following the abandonment of the joint venture. These shares were

valued at a premium predicated on the value of the second defendant's shares and the value of the two production lines at the time of issuance of those shares. The plaintiff has been fully paid for his two production lines through the issuance of the shares. Any profit generated by the lines belongs to the second defendant and are not held on trust for the plaintiff.

[68] In respect of the rights issue in 1994, the second defendant claimed that it was precipitated by its need for funds to facilitate its further business expansion. The defendants denied that the plaintiff was discriminated against on the issuance of new ordinary shares. The only person accorded the privilege of an additional allotment of shares was Wong, due to his unique and vital contributions.

[69] Specifically, on the allegation concerning the reduction of the plaintiff's subscription by reason of the returned cheque, the defendants contended that it was not due to a clerical error as claimed by the plaintiff, but due to the plaintiff having insufficient funds. This may be seen from the bank's endorsement on the back of the cheque — 'Exceeds Arrangement'.

[70] On the matter of the non-listing of the second defendant in 1996 that was due to the plaintiff's refusal to sign the statutory declaration, the defendants contended that that decision was not an irrational conclusion since it was a direct consequence of what the defendants described as the plaintiff's 'unreasonable and illogical behavior'. The prevailing regulatory requirements mandated that all substantial shareholders which would include the plaintiff to sign that statutory declaration form without which the listing exercise could not have proceeded.

[71] As for the plaintiff's complaint on the retransfer of the shares back to his own name, the defendants contended that it was incumbent on the plaintiff to do so himself once he received the share certificates in May 1997. The plaintiff's retransfer done only in October 1999 was due to his own neglect, omission or delay.

[72] The defendants further pleaded that in any event, it would have been impossible for the second defendant to effect the retransfer of the 333,037 shares to the plaintiff by May 1997 since the plaintiff only released the relevant documents to the second defendant's company secretary vide his letter dated 15 October 1999.

[73] On the matter of the plaintiff's claim of beneficial ownership, the defendants contended that the articles of association of the second defendant provided that the second defendant was not bound to recognise such ownership; that the onus was on the plaintiff to ensure that he received his

dividends in respect of the 333,037 shares. Since the records show that the dividends were payable to Ashaari bin Ramli and Azman bin Dahlan, the plaintiff's cause of action, if any, would be to recover the dividends against them, and not the present defendants.

[74] Moving next to the EGM in 2004 where the capitalisation exercise was approved and authorised, the defendants explained that at the material time, the second defendant was undertaking massive expansion under Phase 2 and needed a substantial amount of funding, some RM38m to be precise. There was no prior or any agreement to injure the plaintiff. At that time, the board of directors of the second defendant had decided that the funding would not be structured as a rights exercise as it could not be undertaken by all the existing shareholders.

[75] Despite that position, the third defendant inquired with the plaintiff's proxy who attended the EGM if the plaintiff was prepared to subscribe for more shares. The proxy had refused and/or was unable to respond due to mandate issues.

[76] The third defendant further contended that the share allocation decided at that EGM was in accordance with the second defendant's articles of association. Article 57 therein empowered the directors to allot shares in the second defendant to such persons as the directors 'think beneficial to the Company'.

[77] On the allegation that there were dilutions of the plaintiff's shareholding, that there was a 'shifting' in the voting control, the defendants not only denied such allegations but contended that there could not be any dilution or shifting in the voting control since the plaintiff never 'controlled' the second defendant 'from day one certainly not through his 6.34% shareholding' (or 4.43%) interest.

[78] At para 86 of its re-amended defence, the defendants contended that the 'main cause of the plaintiff's shareholding dilution had been his refusal in the past to subscribe for shares offered to him from time to time and arising from his dishonoured cheque as set out above'.

[79] Moving next to the defendants' response on the listing of the first defendant, aside from the fact that the 16 shareholders were given till 4 October 2006 to respond on the sales and purchase agreement concerning the sale of their shares in the second defendant to the first defendant in exchange for shares in the first defendant, the defendants contended that it was the plaintiff who, on his own free will, signed the agreement on the very same day that he was given a copy of the agreement.

[80] It was also the contention of the defendants that in any case, the listing exercise eventually prospered all shareholders of the second defendant, including the plaintiff.

[81] On the matter of the plaintiff's subscription for more shares in the first defendant, the defendants explained at para 104 of the defence that the third defendant 'actually had sympathy for the plaintiff and went out of his way to cause for the allocation of the 500,000 shares to the plaintiff', that the first defendant offered the plaintiff the 500,000 shares as a 'gesture of goodwill', and that the plaintiff was the only shareholder who was given the privilege of subscribing for more shares.

[82] The defendants further relied on the following:

(a) estoppel, that the plaintiff's conduct including his participation in the second listing exercise is completely incompatible, inconsistent and incongruous with his current claims and allegations;

(b) that the plaintiff was never identified or informed that he was within the category of persons who had contributed to the success of the group;

(c) that the plaintiff never contributed in any meaningful sense to the second defendant's success or that of the group;

(d) that the plaintiff did not hold any office in the second defendant in the 20 years that he was a shareholder;

(e) that the plaintiff did not make any contribution whatsoever to the growth and prosperity of the second defendant; and

(f) that the claims are time-barred.

[83] Insofar as the fourth and fifth defendants are concerned, over and above defences which are substantially similar to those pleaded by the first to the third defendants as discussed above, there are specific defences that require mention.

[84] The fourth defendant pleaded further that:

(a) the claim is an abuse of process;

(b) he is not aligned to the third and/or fifth defendants;

(c) he did not act in accordance with the directions and instructions of the third defendant;

(d) he does not sit on the board of directors of the first defendant;

(e) the third defendant is not the controlling mind and person behind the second defendant nor does he have de facto control over the board of directors of the second defendant;

(f) he is unaware of any trust arrangement in respect of the Nanyang equipment and that the records of the second defendant do not allude to any relationship of trustee-beneficiary between the second defendant and the plaintiff; and

(g) the growth of the second defendant was due to the constant innovation and substantial capital investment undertaken over the last 20 years.

[85] The fifth defendant specifically pleaded that:

(a) he did not keep track of the shareholdings of the third and fourth defendants in the second defendant;

(b) acted and decided on his own based on his own interest at board meetings and at the relevant EGM;

(c) he was never directed or instructed by the third defendant in any manner as alleged by the plaintiff;

(d) the plaintiff's claim is scandalous, frivolous and is otherwise and abuse of the process of court;

(e) the plaintiff never opposed to the passing of the resolution agreeing to Wong being granted an approval to subscribe for his rights entitlement, either partially or wholly, nor did the plaintiff complain that the resolution was discriminatory at the material time;

(f) the allegations are untrue; and

(g) since the plaintiff was the only substantial shareholder who had unreasonably and illogically refused to sign the statutory declaration for the listing of the second defendant, it was 'an irresistible conclusion that the plaintiff was the sole cause that the listing could not proceed and that there was nothing 'irrational' about this conclusion'.

[86] Like the first three defendants, the fourth and fifth defendants, inter alia, pleaded that the success of the second defendant was not in any way due to the efforts and/or contributions of the plaintiff as he held neither an executive position nor assumed any other role other than that of shareholder of the second defendant; and that the plaintiff had willingly and without reservation participated in the share allotments and proposed listing of the second defendant at the material time.

AT THE HIGH COURT

[87] The plaintiff called two other witnesses other than himself to testify. Those two witnesses were the lawyers who had played specific roles in the

plaintiff's claims. The third defendant, on the other hand, testified on behalf of himself and for the first and second defendants.

[88] The third defendant's evidence was subsequently adopted by the fourth and fifth defendants. This adoption has been criticised and challenged by the plaintiff, who argued that these defendants should have made a submission of no case to answer. Their counsel had argued that there was no need to take such a stand. These defendants had also filed witness statements during case managements. After the third defendant had testified, they decided to adopt his evidence without themselves testifying. That course of action and the reference or reliance to the third defendant's testimony was also in issue.

[89] As for the issues for determination, the learned judge categorised them into three broad issues before dealing with the claim against the fourth and fifth defendants, and finally the issue of limitation:

(a) issue 1 — Nanyang lines;

(b) issue 2 — dividends;

(c) issue 3 — plot or conspiracy relating to share capital increase in second defendant for 1994, 1997, 2004, 2008 listing, application for accounts;

(d) claim against the fourth and fifth defendants; and

(e) time-bar.

[90] After a full hearing, the learned judge did not find the arguments in the plaintiff's favour, ruling ultimately in all the defendants' favour and dismissing the plaintiff's claim. Hence, the appeal.

OUR FINDINGS AND DELIBERATIONS

[91] We propose to deal with the learned judge's conclusions and reasoning on the matters appealed on as we discuss our findings and deliberations on the same in this appeal, following the issues as categorised by the learned judge.

[92] We note from the 'Speaking Note' and subsequently from the final reply on appeal of learned counsel for the plaintiff certain matters that need to be addressed first. In the speaking note and this was developed in the final reply, two main points were articulated as forming the basis of this appeal, that there was erroneous judicial appreciation and misdirection and errors of law of these two central matters that require appellate intervention.

[93] First, concerns the relationship of the parties, how it was treated, that there was a mischaracterisation. Second, concerns the appreciation of the

events that form the substratum of the plaintiff's claim, that given the relationship of the parties, the events ought to have been considered as a consecutive story with reference to the pleaded case and factual matrix instead of as separate and individual events seen in isolation or in vacuum.

[94] On the first concern, it was submitted that the 'substantive complaint of the plaintiff against the judgment under appeal is that the learned judge erred in law in treating the parties as standing in an ordinary business relation when the relationship in point of law was fiduciary in nature'. In other words, there was a mischaracterisation of the relationship. It was said to be a joint venture and that in law renders the parties as fiduciaries. Such erroneous evaluation and appreciation of the case and the issues are said to be grounds for appellate intervention.

[95] Various authorities were cited in support on these principles including *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; *Govinda Mudaliar Sons v Govindasamy* [1967] 2 MLJ 5; *Bolton (HL) (Engineering) Co Ltd v TJ Graham & Sons Ltd* [1957] 1 QB 159; *Meinhard v Salmon et al* 164 NE 545 (NY 1928); *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd)* [2014] 3 MLJ 785; *Clemens v Clemens Bros Ltd & Anor* [1976] 2 All ER 268.

[96] According to learned counsel, the learned judge had erred in looking at the form and not at the substance of the underlying relationship. Whilst accepting the '1990 document' as a joint venture, the learned judge erred in treating it as a failed joint venture when the proposed joint venture company was not formed and because it was not a term of the joint venture that the two manufacturing lines should be transferred to the second defendant. Learned counsel added that the existence of this document does not prevent the court from holding that the document is a joint venture giving rise to a fiduciary duty — see *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474.

[97] The learned judge was also said to have failed to apply the proper legal test and that her approach was contrary to settled law. Her failure to do so is said to be a serious error that has occasioned a miscarriage of justice. It was the plaintiff's submission that the right question to ask was whether the defence version is consistent with the probabilities of the case. Had that correct question been asked, Her Ladyship would have rejected the defendants' version as improbable and accepted the plaintiff's version.

[98] The plaintiff's version that ought to have been accepted was that the joint venture did not cease but the vehicle to carry out that intent was altered. Together with the plaintiff's transfer of his two production or manufacturing

lines to the second defendant and the fact that there was no further document evidencing a change of the prior existing relationship, the court ought to have drawn the irresistible inference that the relationship of joint ventures continued. The transferred two lines were said to be valued at RM1m in 1990 and it was 'highly improbable that a person will give away his property worth RM1m which in 1990 was worth a substantial sum, and pay an additional sum of RM200,000 in exchange for RM36,000 worth of shares'. Learned counsel submitted that 'that relationship imposed upon the first to the third defendants a constructive trust that enured for the plaintiff's benefit. Accordingly, the conscience of the defendants was bound by an obligation to act in utmost good faith towards the plaintiff'.

[99] It was also submitted that insofar as the 49% interest in the second defendant is concerned, the plaintiff's claim is that he is a beneficiary under a constructive trust. This trust exists because of his contribution as a joint venturer. He had contributed his two manufacturing lines in expectation created by the third defendant of receiving 49% in the second defendant at the time the joint venture was created. The plaintiff only became shareholder of the second defendant based on the joint venture between the plaintiff and the third defendant who was directing mind and will if not the alter ego of the first and second defendants. The allocation of 20% shares was alleged to be a breach of the terms of the joint venture. It was submitted that the defendants were thus not entitled to treat the plaintiff as a mere shareholder; the defendants were 'fiduciaries and constructive trustees' who were obliged not to act against the plaintiff's interests or cause wrongful gain to themselves.

[100] The second concern was that 'given the nature of this case', judicial appreciation required the court to consider the events over a period of time with reference particularly to the relationship just discussed; a holistic and not almost snap shot considerations of that relationship and the complaints raised. The case of *Bounty Dynamics Sdn Bhd (formerly known as Media Development Sdn Bhd) v Chow Tat Ming & 175 Ors* [2016] 1 MLJ 507 was cited in support.

[101] In oral reply submissions before us, the defendants impressed upon us their difficulty in responding to the submissions of the plaintiff because his case has 'shifted and evolved'. The line of submissions has departed from the pleaded case, the evidence led at trial and the submissions made before the High Court as well as the written submissions made in this appeal.

[102] While the arguments in principle are valid concerns in any appeal and we would have no hesitation in wading in, if established; these submissions are unfounded and of no merit in this appeal.

[103] We have examined the pleaded case very carefully, and we do not agree with the plaintiff's contentions. We do not see any mischaracterisation of the relationship by the learned judge. In fact, the understanding and appreciation by the learned judge is supported by the plaintiff's own oral testimony at trial, the contents of the so-called 1990 document itself, the testimony of the third defendant, and the plaintiff's own subsequent conduct.

[104] First, the plaintiff's own pleaded case refutes that line of submission. There is no claim to this effect. Although parties are only required to plead material facts with the legal consequences of such facts to be matters for the court to adjudicate upon as pronounced in *Superintendent of Lands and Surveys (4th Div) & Anor v Hamit bin Matusin & Ors* [1994] 3 MLJ 185 and that the parties cannot be taken by surprise as trials are not of ambush (see *Ang Koon Kau & Anor v Lau Piang Ngong* [1984] 2 MLJ 277 and *Gurbachan Singh s/o Bagawan Singh & Ors v Vellasamy s/o Pennusamy & Ors (on their behalf and for the 213 sub-purchasers of plots of land known as PN35553, Lot 9108, Mukim Hutan Melintang, Hilir Perak) and other appeals* [2015] 1 MLJ 773), the underlying facts and allegations are nevertheless material to that adjudication.

[105] In this appeal, the plaintiff's pleaded case on the joint venture can be found at para 13 of the amended statement of claim. There are no allegations that the parties, whether it be the second or the third defendant, had always intended to set up a joint venture in any form or degree. On the contrary, the allegation is specific — see para 13.4 where the plaintiff alleged that the third defendant agreed with the plaintiff to set up a joint venture whereby the plaintiff would transfer his two manufacturing lines with its boiler system 'to a proposed joint venture entity as capital contribution on his part'. In turn, the third defendant was to transfer the existing manufacturing line installed in the second defendant to the said proposed joint venture entity as well. The third defendant agreed that the plaintiff was to have 49% shareholding in the proposed joint venture entity.

[106] At para 13.11, the plaintiff claimed that the third defendant in breach of his promise, 'did not set up a separate entity to run the manufacturing lines'. Instead, the third defendant caused the second defendant to issue to the plaintiff 174,000 new shares in the second defendant as the plaintiff's capital contribution having regards to his relocation of his two manufacturing lines to the second defendant. The 174,000 shares represented 20% of the paid-up capital of the second defendant.

[107] This allegation is specifically traversed and denied by the first to the third defendants; that the agreement to set up a joint venture was never between the parties as claimed by the plaintiff, but between the plaintiff and Hartalega Industries Sdn Bhd, that the intention as alluded to in para 62 was to

set up a company to be known as HRPSB, and that the transfer of the plaintiff's existing two lines was as a result of his investment in the second defendant.

[108] At the trial, these two versions on the joint venture were proffered by the respective parties. And, even then, the version ran by the plaintiff was not accepted by the court. The court accepted the defendants' version and it was not without basis. The two versions of the joint venture was never on the matter of form or labelling of the relationship or about the intention of the parties to always form a joint venture.

[109] There is also the '1990 document' ('exh D138') itself which we have examined and which we find bears up to the defendants' version. This document is actually the minutes of the meeting held between the parties (see p 504 CBD2/3):

> Minutes of the Meeting between Mr. Errol Seow of MLB Holdings Sdn. Bhd. of one part and Mr. Kuan Kam Hon Hartalega Industries Sdn. Bhd. (HI) of other part at the office of Raja Salleh, Lim & Co., No.6B, 2nd Floor, Bangunan G.G.I., Jalan Ampang, 50450 Kuala Lumpur on 12th day of April, 1990 at 3.00pm
>
> | | | |
> |---|---|---|
> | 1. | Forming of new Company: | It has been agreed that a new Company by the name of Hartalega Rubber Products Sdn. Bhd. (HRP) is to be incorporated. The issued share capital will be 1,125,000 shares of $1 each. |
> | 2. | Equity: | 51% - HI
49% - Mr. Errol Seow and his nominees. |
> | | | HRP will take over the plant and machinery of MLB Holdings Sdn. Bhd. valued at $1 million out of which $875,000 will be satisfied by the issue of shares in HRP and the balance of $125,000 to be settled in the manner set out below and HRP will also take over the plant and machinery valued at $250,000 from HI. |
> | 3. | Transfer of Shares: | Mr. Seow agreed to transfer subsequently his shareholdings of 323,750 to HI for a token value of $1. |
> | 4. | Ultimate share structure of HRP: | Hartalega Industries S/B – 573,750 shares of $1
Mr. Errol Seow and his nominees – 551,250 shares of $1
1, 125,000 |
> | 5. | Directorate: | Messrs. Kuan Kam Peng, Kuan Kam Hon, Errol Seow and Mrs. Seow will be appointed as directors of HRP. |
> | 6. | Managing Director: | Mr. Kuan Kam Hon is to be appointed as Managing Director of HRP and his appointment will not be subject to removal. |

7.	Advance:	Mr. Seow will advance $100,000 to HRP as soon as HRP is incorporated. HI will also advance $100,000 to HRP in the form of receivables or stocks which ever Mr. KKH deems fit.
8.	Transaction Period:	The position of HI and MLB will remain status quo, and that the current operating expenses of MLB should not be borne by HRP.
9.	Try-out period:	During the initial period, when HRP operates on one line, the rental of factory premises will be borne by Mr. Seow, and as soon as HRP operates the second line, rental will be fully borne by HRP.
10.	Repayment of Loan:	The outstanding balance for the machinery taken over of $125,000 will be paid to Mr. Seow out of the profit by HRP in the proportion of 2/3.

[110] These minutes form the contemporaneous record of the underlying intention and agreement of the parties. The minutes reveal that the parties, the plaintiff of MLB and the third defendant of Hartalega Industries Sdn Bhd had agreed to form a new company on very specific terms and conditions. It is undisputed that the new company was never formed. The plaintiff submits that it was always the intention of the parties to form a joint venture, the vehicle may change but that intention remained.

[111] We should not over-read that agreement, it would be highly improper to do so as seen from the line of authorities from the Federal Court including *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597; *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor* [2016] 1 MLJ 464.

[112] There is also the fact that the second defendant was already incorporated at the time of the discussions between the parties. An exercise or arrangement wherein the plaintiff was to become the joint venture partner in the second defendant would surely be reflected in the corporate records and annual accounts and statements of the second defendant. There are none.

[113] This evidence together with the issue of shares in the second defendant to the plaintiff without any complaint for over almost 20 years prior to the filing of the claim are silent but overwhelming evidence against the plaintiff's claim on the joint venture. The evidence irrefutably show that the plaintiff stood, at the material time, as shareholder and not in joint venture with the defendants.

[114] As for the manner in which the learned judge appreciated the claim, that it was taken in isolation and not seen as a whole and proving the plaintiff's

claim, that complaint is similarly without merit. The very nature of the plaintiff's claim required the learned judge to examine each of those signposted events in the manner that she did. At no time did Her Ladyship lose sight on what the plaintiff's claim was all about.

As urged by the plaintiff in this appeal, we will similarly examine those complaints.

Issue 1 — Nanyang Nanyang lines/Nanyang equipment

[115] The plaintiff appellant has referred to this as the 'stored parts' or the 'Nanyang lines'. The main remedies sought against the second defendant in this respect are as follows:

(a) declaration that the second defendant is a trustee for the proceeds and/or profits made from the benefit and use of the Nanyang equipment; and

(b) an order that the second defendant account to the plaintiff for the proceeds and/or profits made from benefit and use of the Nanyang equipment and make restitution of the same to the plaintiff.

[116] Similar orders are sought against the third defendant save that it is made on the basis of a constructive trust.

[117] The specific defence to this claim is a denial of receipt and holding in trust of these spare parts, that there is no trust arrangement between the parties; hence there is no breach of trust. The defendants further related how the parties came to be involved with one another and how the plaintiff's two production lines were dismantled and reassembled at the second defendant's premises; that the reusable parts of the two lines became spare parts; that the plaintiff's lines were paid for through the issuance of 174,000 shares by the second defendant; and that the claim was time-barred.

[118] The learned judge treated this issue by asking three questions:

(a) whether the Nanyang lines had been transferred to the second defendant;

(b) if the lines had been transferred whether the second and third defendants held the lines as constructive trustees for all the benefits and revenue received from the use of these lines; and

(c) whether the claim in relation to the revenue or benefits resulting from such use is time-barred.

[119] Having looked at the original text of the grounds of decision, we find that the learned judge posed the second question as thus — if the lines had been

transferred, whether the second and third defendants hold the benefit and revenue from the use of the Nanyang lines as constructive trustees.

[120] The learned judge found that the plaintiff had not proved his claim under ss 101–102 of the Evidence Act 1950 for the following reasons:

(a) it was the responsibility of the plaintiff to prepare a comprehensive list of the Nanyang equipment or inventory and to request the second or third defendant or their representatives to acknowledge receipt by signing on the inventory or list;

(b) the plaintiff did not prepare such an inventory or list;

(c) the plaintiff did not manage the dismantling, delivery and reinstallation at the premises of the second defendant as agreed;

(d) the plaintiff left it to the transport company to confirm that the containers allegedly containing the Nanyang equipment were brought to the second defendant's factory and handed over to the second defendant through the second or third defendant's representative;

(e) the remark on the invoice number 9115 IP3A (exh P3A) which reads 'Consignee Name — Hartalega S/B (Nanyang Lines) was inadequate because there was no verification by way of an inventory of the contents of the container;

(f) the discrepancies between exhs 3A and 3B were not explained;

(g) the original document (exhs 3A and 3B) were not produced for verification; and

(h) no witnesses from the transport company were called to confirm that the containers allegedly containing the Nanyang equipment were delivered to the second defendant's factory and handed over to its representative.

[121] The learned judge took the position that the burden was on the plaintiff to prove that the Nanyang lines were put into the containers and delivered to the second and third defendants. The plaintiff must produce strict evidence to prove his case. Since delivery was not proved, the issue of trust, constructive trust and conversion does not arise.

[122] In the appeal before us, learned counsel argued that these findings were incorrect because there was ample evidence within the case of the first to the third defendants to support an irresistible inference that the Nanyang equipment had been delivered to the second defendant. That evidence being exhs 3A and 3B, and the testimony of the third defendant.

[123] It was submitted that the learned judge also seriously misdirected herself in law when Her Ladyship dealt with the issue of the Nanyang lines as a matter relating to the burden of proof when all she was required to do was to draw the proper inferences from the totality of the evidence before the court. In any case, the court's evaluation of the evidence was flawed because there was, inter alia, no reference to the third defendant's sister or to the second and third defendants' failure to call that sister to testify. The documents before the court were also not examined with the care required of a judicial tribunal. Further, there was no critical analysis of the discrepancies in the evidence given by the third defendant.

[124] According to learned counsel, there were contradictions in the case for the first to the third defendants. In the defence filed, these defendants had pleaded that the transfer of the assembly lines was supervised by Wong. Yet, in a witness statement prepared for Liew, Liew said that he supervised the transfer. Both Wong and Liew were not called to testify. The plaintiff submitted that Liew's witness evidence was admissible and available for use as another version of an event as the statement was filed and served and the learned judge erred in ruling otherwise. The application of the burden of proof by the learned judge was thus said to be misconceived.

[125] Learned counsel further submitted that the learned judge was wrong in holding that the plaintiff had failed to prove the trust property. The learned judge had treated the plaintiff's case separately from that of the defendants and asking whether the plaintiff had discharged his burden. The correct question the learned judge should have asked herself is whether on the totality of the evidence, it was a fair inference that the Nanyang lines had been delivered to the second defendant. Based on the material before the court, that question would have received an answer adverse to the first to the third defendants. The Nanyang lines admittedly received by the third defendant's sister was the trust property.

[126] With respect, we disagree. Discussing and reminding herself on the burden of proof and who bears that burden is not erroneous on the part of the learned judge. Having carefully examined the reasoning of the learned judge, we further conclude that Her Ladyship did not reach her findings on this question by simply looking at what the plaintiff had adduced. Her Ladyship did evaluate the totality of the evidence before the court in reaching her conclusions and this is evident from the grounds at paras 28–30.

[127] In the first place, to succeed in a claim in trust, express, implied or even a constructive trust of certain property, amongst others, the existence of that property must first be established and there must be certainty of existence of the trust in respect of its words, subject and object; frequently referred to as the

'Three Certainties' — see *Lewin on Trusts* (19th Ed, Sweet & Maxwell 2015) at p 102; *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614. If the three certainties are not present, there cannot be a trust established.

[128] In the case of *Kamla Lal Hiranand v Harilela Padma Hari and Others* [2000] SGCA 40, the Court of Appeal of Singapore found that a document known as 'the 1988 document' purportedly evincing the intention of the deceased to distribute his properties in the manner stated therein, though unequivocally testamentary in nature, was incapable in law of creating a trust whether under the Singapore Wills Act, or under the relevant laws of Hong Kong and the State of California as it was not validly executed as a will. Consequently, the declaration was refused. The alternative declaration that the respondent's knowledge of the testator's declared intention and wishes to distribute the estate amongst the appellant and the respondents and their children amounted to a trust was similarly refused for want of particulars, terms and details of the trust. The Court of Appeal opined that that would amount to inviting the court 'to determine or lay down the terms of the trusts without furnishing any basis upon which the court is asked to embark on this exercise. There is absolutely no certainty as to the terms or the subject matter of the trust claimed by the appellant. On this ground alone, the claim must fail'.

[129] Similar views may be found in *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97, where the Court of Appeal, citing its earlier decision in *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422 in support, opined that clear and unequivocal language must be used to establish a trust. The standard of proof 'in given circumstances is a high one ...'. It is in this respect that the learned judge found it difficult to agree with the plaintiff that there was any trust since the existence of the property, the very subject matter of the trust, could not be satisfactorily established, let alone the establishment of intention to create a trust and the acceptance of such obligation. See also *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd; Tan Sri Halim Saad & Che Abdul Daim Hj Zainuddin (interveners)* [2007] 5 MLJ 501; [2007] 4 CLJ 725.

[130] We note that what exactly were these spare parts or Nanyang equipment or Nanyang lines was actually not properly proved by the plaintiff. At para 13.8 of his statement of claim, the plaintiff pleaded that:

> 13.8 At the material time the plaintiff relocated the said two manufacturing lines to the factory premises of Hartalega, he also relocated substantial parts of another two lines which he had purchased, packed in containers (hereinafter referred to as 'the said parts'), to Hartalega's factory premises for temporary storage. The third defendant was told by the plaintiff that the said parts were to be returned by the plaintiff in due course for a reimbursement of RM250,000.

[131] These allegations were denied by the defendants — see para 24 of the re-amended defence of the first to third defendants.

[132] In support of this claim, the plaintiff led oral and documentary evidence. Oral testimony came in the form of evidence from the plaintiff himself where at Q&A 68, and Q&A 94–103 of his witness statement, the plaintiff testified as follows:

Q68: In addition to the 2 lines, was anything else delivered to the second defendant's premises?

A68: I had also sent part of another 2 lines which were packed in containers at the factory premises in Kepong and entrusted the third defendant with them. He told me that we would take care of them and assured me that the parts would be safe.

...

Q94: Earlier you were asked and you have answered that you had transferred parts of 2 lines to the second defendant's factory. How did this transfer take place?

A94: They were transported.

Q95: How were they transported?

A95: They were transported by containers.

Q96: Where did these parts come from?

A96: From my supplier Nanyang.

Q97: What did you actually order from Nanyang?

A97: I ordered 2 complete latex glove manufacturing lines.

Q98: Did Nanyang deliver the 2 complete lines you ordered?

A98: No. Their delivery was incomplete.

Q99: What could one do with the parts delivered by Nanyang?

A99: Add on to it, and complete 2 lines.

Q100: When Nanyang did not deliver the 2 complete lines, what did you intend to do with the parts delivered?

A100: I intended to return these parts and get my money back.

Q101: What was your purpose in sending these parts to the second defendant's factory?

A101: To store them there.

Q102: Did the third defendant agree to you storing these substantial parts at the second defendant's premises?

A102: Yes, he did.

Q103: After the parts had been stored in the second defendant's premises, what did you do?

A103: I went abroad to attend to my other businesses.

[133] The documentary evidence was in the form of transport documents purportedly evidencing the transport of the containers containing the spare parts or Nanyang equipment or Nanyang lines to the second defendant's premises. No other documents were adduced in support.

[134] We have examined the relevant oral evidence together with all these documents very carefully and having done so, we not only appreciate and understand but share the same concerns as expressed by the learned judge. We agree with the learned judge that in relation to these documents, clarification, verification and explanation from the relevant witnesses is very much required, and the plaintiff is not such a person to meet that need.

[135] We cannot agree with the submission of the plaintiff that because there was proof of receipt by the second defendant of the Nanyang equipment, there was delivery of these equipment. Receipt cannot ipso facto be evidence of the delivery of the spare parts, especially where the delivery and the contents of the containers is disputed.

[136] As far as these documentary evidence was concerned, we understand that they are to be found in 6IDP pp 2007–2009, 2012–2013 and 2015–2017, identified by the plaintiff as being the relevant documents. These documents were variously described as invoices and delivery notes. They were issued by transport companies for transporting the containers, supposedly containing the two manufacturing lines and the spare parts or Nanyang equipment to the second defendant's premises and, by the crane companies for loading and unloading the same. Pages 2007–2009 were the delivery notes that were respectively marked as ID2A, ID2B and ID2C; whilst pp 2012–2013 were marked as P3A and P3B. Page 2015 was marked as P3C while pp 2016–2017 were marked as P4A and P4B.

[137] All these documents were issued by different companies. ID2A, ID2B and ID2C were issued by Pengangkutan LF Sdn Bhd bearing dates 30 May 1990, 31 May 1990 and 24 June 1990 and they were originally made out to Span Industries Sdn Bhd as the consignor before that name was deleted and replaced with the plaintiff's company MLB Sdn Bhd, referred to in his statement of claim.

[138] P3A and P3B, on the other hand, issued by Yew Lee Transport Agency are the particular documents relied on by the plaintiff as they bear the consignee's acknowledgment and the plaintiff's testimony is that the signature is that of the third defendant's sister. However, P3A and P3B warrant clarifications and explanations from the maker, as the plaintiff was in no position to explain away the inconsistencies. The documents both of which are dated 29 June 1990 do not describe two containers as being hauled in the two trips, even if 'Nanyang lines' is mentioned against the name of the consignee, Hartalega S/B. The documents only describe '2 trips' as having been performed. This is quite unlike ID2A to ID2C where the number of loads of equipment (including Nanyang — two incomplete lines) are mentioned, but those trips were made earlier in May 1990, by a different haulage company and the documents remained marked for identification only.

[139] In his evidence in chief, the plaintiff had explained at Q&A 77 about 6IDP 2015 marked as P3C, that this invoice made out to Span System PJ was from the transportation company and it was for the delivery of the boiler and two containers from his factory to the second defendant's factory. According to the plaintiff, Span System was the company that purchased the parts for the two lines from Nanyang.

[140] Having examined this piece of evidence, once again, we find that it raised more questions than it provides answers. The invoice refers to 'hydraulic truck crane of 40 tons' operating between hours of 10am to 12 noon and 1pm to 6.30pm wherein the total charges for such services was RM700. The remarks appearing on the invoice states: 'Loading boiler + containers (2x20') in PJ and deliver unload at 9 Jln Kanan'. This invoice is dated 6 July 1990 while the earlier two documents relied on by the plaintiff also to show delivery, exhs 3A and 3B, are dated 29 June 1990.

[141] The payment for the crane services can be found in exh P4B. It is dated 19 July 1990 and it is in respect of two invoices Nos 13622 and 13536. The receipt is issued out to MLB Holding Sdn Bhd. Invoice No 13622 dated 6 July 1990 is exh P3C made out to Span System whereas invoice No 13536 is exh P4A made out to Span Engineering Co and it is dated 11 July 1990.

[142] As can be seen, none of these documents, including those relied on by the plaintiff, are made out to the plaintiff himself. Span System, Span Industries Sdn Bhd, Span Engineering Co or even MLB, names appearing in the documents relied on to prove the plaintiff's claims on the spare parts, are not claimants in the claim filed by the plaintiff. No explanation was forthcoming as to how the plaintiff came to be making these claims.

[143] Even assuming for one moment that the plaintiff is entitled to make this claim, there are no purchase orders or other similar documents detailing the purchase of the two lines or spare parts from Nanyang, and what could possibly be the spare parts, substantial in any sense, that was referred to and claimed by the plaintiff. Identification of the spare parts was seriously in issue and the plaintiff failed to address that challenge.

[144] More importantly and as pointed out by the learned judge, the plaintiff did not attend to the dismantling, delivery, reinstalling or reassembling of the lines, including the spare parts. He did not even pack the parts into the containers, whether by supervising that packing or in any other way. He left it to the transport companies. He was, therefore, in no position to assert in any manner whatsoever that the spare parts or the Nanyang lines went into or was packed into any of the two containers since he had no personal knowledge.

[145] As pointed out by the learned judge, the plaintiff ought to have prepared a comprehensive list of the inventory at the material time and ensure that the defendants acknowledge any receipt against that same list. None was done in which case, the requirement of strict proof of the existence of the spare parts was not met.

[146] We agree wholly with the learned judge. In asserting the existence of trust or even conversion, there must be clear and firm evidence to prove the existence and identification of the subject matter of the trust, which in this appeal would be the spare parts, and all the elements of a trust. The claim is premised on the existence of a trust, an express trust for which there must be shown either some document evidencing the creation of a trust, the subject matter of the trust, its terms dealing with matters such as purpose of the trust, the duties and obligations of the donor and trustee, as the case may be. Since the plaintiff failed to establish these necessary elements, we find that the learned judge had quite rightly, in law and on the facts, dismissed this claim.

[147] The learned judge has, in our opinion, rightly accepted the challenge of the defendants that aside from not providing the necessary details or documents to establish the trust, the plaintiff also did not provide evidence as to when, where and how such a trust came to pass. In particular, he gave no details or information on where he claims to have communicated with the third defendant on these spare parts, what his instructions were in relation to their use, assuming he left the spare parts with the second defendant. The plaintiff further did not list the items that make up the 'spare parts' or lead evidence of ownership of such parts.

[148] It is therefore not surprising then that when the third defendant denied the claim which is alleged by the plaintiff for the first time in 20 years by way

of a claim in a civil suit; the learned judge believed him. We agree with the learned judge that the plaintiff had failed to prove and identify the spare parts and the existence of any trust.

[149] We find this conclusion founded given the evidence. If indeed the plaintiff wanted to return the spare parts to Nanyang on the basis that Nanyang had delivered incomplete parts, it would have been reasonable to expect the plaintiff to return the parts promptly and within reasonable time, and returning them directly to Nanyang instead of leaving them with the defendants. Instead, the plaintiff left the dismantling of the lines to third parties with no proper records kept.

[150] Thus, the plaintiff is in no position to assert that the spare parts were also sent to the second defendant's factory at the time his two undisputed manufacturing lines were sent. We agree entirely with the learned judge that the remark on the invoice number 9115 IP3A (exh P3A) which reads 'Consignee Name — Hartalega S/B (Nanyang lines)' was inadequate because there was no verification by way of an inventory of the contents of the container.

[151] The conduct of the plaintiff in not asking for the return of these parts, or to raise the issue, contemporaneously, especially by way of a written or formal demand, confirms the defendants' contention that this claim is really a non-starter. Since the plaintiff wanted to return the spare parts to Nanyang, it would have been reasonable to see him asking or taking appropriate steps to require their return after he had returned from abroad, some two years later. Instead, his claim made some 18 years later does not ring true.

[152] We agree with the learned judge that 'it is not reasonable and contrary to logic' that the plaintiff left the spare parts with the second/third defendants and that he was going to return them to Nanyang after he returned to Malaysia in 1993, after having bought the parts in 1989. The learned judge rightly concluded in the circumstances that it was 'mere suspicion on the part of the plaintiff without concrete evidence that the second and third defendants had five production lines and had reaped profits by using the Nanyang equipment'.

[153] The third defendant's explanation on the spare parts was also plausible and credible — that when extra equipment parts were found after the lines were installed, 'as far as he was concerned they were part of the two (2) production lines installed'. In consideration of that contribution from the plaintiff, the plaintiff had been offered 174,000 shares in the second defendant which offer was accepted by the plaintiff without reservation.

[154] The plaintiff complained that the learned judge had failed to evaluate the totality of evidence when dealing with this issue that the learned judge ought to have taken into consideration evidence from the defendants' case to determine whether his claim in this respect was made out. According to the plaintiff, there were inconsistencies in the defendants' case here, on the role of one Liew, which if properly regarded, would have proved the plaintiff's case.

[155] With respect, we also disagree with this aspect of the plaintiff's submissions.

[156] The learned judge had refused to admit the evidence as found in Liew's witness statement as Liew was not called to testify. Liew had been listed as a witness to testify for the first to the third defendants. A witness statement was prepared, filed and served. It was, however, unsigned.

[157] Although he did not testify, the plaintiff's counsel argued that the statements in Liew's witness statement may nevertheless be used with limitations to challenge the third defendant and to show up para 24 of the second and third defendant's defence as being false. At Q&A 4 and 20 in Liew's witness statement, Liew had said that he witnessed the moving of the production line. At para 24 of the defence, it was pleaded that it was Wong who supervised the moving.

[158] The plaintiff argued that the admission of these particular statements in Liew's witness statement was crucial to establishing the truth as to who actually supervised the moving of the plaintiff's lines, and to show that the third defendant lacked credibility as his and the second defendant's case were inconsistent.

[159] With respect, we disagree with the plaintiff.

[160] In the first place, the witness statement, though filed and served, is unsigned. Until Liew takes an oath at the trial of the claim, and he confirms that the contents of the witness statement represent his testimony and he finally affixes his signature to the statement, that witness statement cannot amount to or be admitted as evidence. It certainly cannot be ascribed to Liew or be suggested that it is Liew's evidence given that he is not even present in court to deal with that concern. It would be the height of breach of natural justice were this otherwise. See the Court of Appeal decision in *Harry Isaacs & Ors v Berita Harian Sdn Bhd & Ors* [2011] 3 CLJ 861 which was also considered and followed by the learned judge in this appeal.

[161] The facts here are entirely different from those in *National Chemsearch Corpn (SEA) Pte Ltd & Anor v Hotel Ambassador (Malaysia) Sdn Bhd* [1975] 2

MLJ 193. In that case, the respondent had obtained judgment against the appellants for negligence in their supply of Brex, a chemical for use in air-conditioning plants and which was found not fit for the purpose for which it was required as the plant failed after Brex was added to it. The complaint before the Federal Court was, inter alia, on the misdirection of the learned trial judge in erroneously drawing an adverse inference from what one Mr Kirby, an agent of the appellant was alleged to have said at a meeting to Kellaway, a representative of the manufacturers and who had prepared a report on the reaction of the chemical. Both Mr Kirby and Kellaway were not called and the report by Kellaway not produced.

[162] It was in that context that the Federal Court remarked that the contents of Kirby's statement, though not called, was admissible. This is entirely different from the facts in the instant appeal where Liew's statement cannot even be ascribed to him as he had not even signed the witness statement. We therefore agree with the learned judge's reasoning in disallowing the plaintiff any reliance on Liew's statement.

[163] In any case, regardless whether it was Wong or Liew who supervised or assisted in the supervising of the dismantling of the lines, the position remains that it was not the plaintiff who had the reasonability of doing so.

[164] We therefore agree with the learned judge that the plaintiff has failed to establish the existence of any trust. Until and unless a trust is established, the plaintiff cannot claim reliance under s 22 of the Limitation Act 1953 and decisions such as *Dato Wira A Nordin bin Mohd Amin & Ors v Rajoo a/l Selvappan & Ors* [2007] 5 MLJ 297; [2007] 1 MLRA 594 are of no assistance. Section 22 reads as follows:

> 22 Limitation of actions in respect of trust property
>
> (1) No period of limitation prescribed by this Act shall apply to an action by a beneficiary under a trust, being an action —
>
> (a) in respect of any fraud or fraudulent breach of trust to which the trustee was a party or privy; or
>
> (b) to recover from the trustee trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to his use.
>
> (2) Subject as aforesaid, an action by a beneficiary to recover trust property or in respect of any breach of trust, not being an action for which a period of limitation is prescribed by any other provision of this Act, shall not be brought after the expiration of six years from the date on which the right

of action accrued:

Provided that the right of action shall not be deemed to have accrued to any beneficiary entitled to a future interest in the trust property, until the interest fell into possession.

(3) No beneficiary as against whom there would be a good defence under this Act shall derive any greater or other benefit from a judgment or order obtained by any other beneficiary than he could have obtained if he had brought the action and this Act had been pleaded in defence.

[165] Section 22(1)(b) deals specifically with the recovery of trust property or the proceeds of the trust property from a trustee. In this case, the whole existence of a trust in the terms described by the plaintiff is under challenge and has not been proved. As said, unless the three certainties are met, there is no trust, and that was what the learned judge found and we agree.

[166] This, in turn means that there cannot be any basis for any constructive trust too (see *Koh Siew Keng (P) & Anor v Koh Heng Jin* [2008] 3 MLJ 822; [2008] 3 CLJ 450 for the discussions on such trusts); again due to the absence of subject matter and the establishment of any terms relating to the trust.

[167] Consequently, any claim in relation to the return of the spare parts, if any existed in the first place, is time-barred as the claim is only made in 2011, long after limitation under s 6 of the Limitation Act 1953 has already set in; and the remedies sought in paras 26(a), (c), (e) and (f); and 27(a), (b), (h) and (k) were rightly dismissed.

[168] We have taken into account the plaintiff's submission about the existence of five lines, that there were five lines in the second defendant's factory when he returned from abroad, that this could only have been made possible by the addition and use of the plaintiff's spare parts. The third defendant has offered, in our view, a plausible explanation which was found credible and accepted by the learned judge and we have no reason to disturb such findings.

[169] Even if the existence of these five lines suggests the use of the spare parts, we are of the view that this may only amount to the commission of the tort of conversion. But, even in this respect, the plaintiff's claim based on the tort on conversion fails also for the same reason, the plaintiff's inability to establish the certainty of subject matter.

[170] The tort of conversion is a tort of strict liability, where the specific property must be identified — see *OSK Trustees Bhd & Anor v Metroplex Holdings Sdn Bhd* [2019] MLJU 76; [2019] 1 LNS 3:

A [42] Yet another glaring factor that seems to have been overlooked, understandably because it is hardly ever an issue, is this — conversion can only exists in relation to specific property — see *Abington v Lipscombe* [1841] 1 QB 766. We would understand this to mean clear and identifiable property, that is, chattels of moveable property. Thus, where a demand is made for the return of the goods, the demand must be clear and unequivocal, and it cannot be for an unspecified part of a larger collection.

[171] The claim founded in the tort of conversion also fails by reason of limitation.

[172] The claim relates to parts taken under the 1990 agreement and which the plaintiff discovered in 1992. Yet, he took no action till his filing of the present suit in 2011. By this time, limitation under the Limitation Act 1953 had long set in. The learned judge was clearly correct in law and on the facts in finding such a claim time-barred.

Issue 2 — Dividends

[173] The plaintiff's claim has been aptly summarised by the learned judge as follows:

(i) 10% dividend on 333,037 shares for the year ending 31 March 1997;

(ii) 110% dividend on 333,037 shares for the year ending 31 March 1998;

(iii) 15% of the fourth dividend on 362,345 shares for the year ending 31 March 1998;

(iv) 5% of the second dividend on 695,382 (333,037 + 362,345) shares for the year ending 31 March 2003; and

(v) whether the claim for dividends is time-barred.

[174] The details relating to these claims are set out above. The total sum involved is RM488,765.25. All these claims were dismissed.

[175] In coming to her decision, the learned judge took pains to examine what and how exactly the claims arose, the evidence led by all sides, and how should such evidence be treated under the law. The learned judge found that the plaintiff formed the view that he had not been paid these dividends after examining exh P49 which is information of dividend payment since incorporation of the second defendant, that is, from 1993–2006. This document was supplied to the plaintiff upon his request.

[176] In respect of the dividends in (i) and (ii) above, the learned judge accepted the defendants' contention that they were not liable for what is

described as 'the plaintiff's nonchalance' (Saya berpendapat defendan kedua dan ketiga tidak bertanggungan atas sikap tidak peduli plaintif sendiri). The learned judge agreed with the defendants that the plaintiff had only himself to blame for reregistering his shares only in October 1999 when the shares were already returned to him earlier in May 1997.

[177] We agree with this finding. In any case, since companies only recognise and pay dividends to registered shareholders, and the plaintiff was not the registered shareholder for the relevant period claimed, the claim was rightly dismissed by the learned judge.

[178] This is evident from s 163(4) of the Companies Act 1965 which reads:

> (4) Except as provided in this section no notice of any trust expressed, implied or constructive shall be entered on a register or branch register or be receivable by the Registrar and no liabilities shall be affected by anything done in pursuance of subsection (1), (2) or (3) or pursuant to the law of any other place which corresponds to this section and the corporation concerned shall not be affected with notice of any trust by anything so done.

[179] Support for this view may also be found in the decisions of *Yeng Hing Enterprise Sdn Bhd v Liow Su Fah* [1979] 2 MLJ 240; *Cheong Yuk Wai v Low Sai Wee & Ors* [2007] 2 MLJ 634.

[180] As for the dividends in (iii) and (iv), the learned judge noticed that the plaintiff himself was unsure whether he had in fact received the dividends paid. The defendants had tendered evidence that the plaintiff had been paid the relevant sum. The learned judge further found that these claims were time-barred.

[181] We agree. Dividends are, at the end of the day, contractual debts owed by the company. Such claims must be filed within six years from the date of accrual of the cause of action, as provided under s 6 of the Limitation Act 1953. As the plaintiff's claims concern unpaid dividends for the years ended 1997, 1998 and 2003, the claim filed in 2011 is clearly time-barred. Support for this position of the law may be seen in the decisions of *BSN Commercial Bank (M) Bhd v River View Properties Sdn Bhd and another action* [1996] 1 MLJ 872; [1996] 1 AMR 1144, and *Re Compania de Electricidad de la Provincia de Buenos Aires Ltd* [1978] 3 All ER 668.

[182] Having examined the records and the reasons of the learned judge and having considered the submissions of both parties, we are of the firm view that all the claims in (i)–(iv) against the defendants are clearly time-barred and were rightly dismissed by the learned judge. The appeal in this regard is therefore of no merit.

Issues 3, 4 and 5 — Plot or conspiracy relating to share capital increase in second defendant

[183] The allegations here pertain to concerted efforts in the form of a plot or conspiracy by the third to the fifth defendants to dilute or decrease the plaintiff's shareholding in the second defendant through the rights issue in 1994 and 1997, the special issue in 2004, and the 2008 listing of the second defendant. The details of the claim and defence were set out earlier.

[184] Upon consideration of the evidence, the learned judge found that the plaintiff's claim in each respect was not sustainable.

[185] For the rights issue in 1994, Her Ladyship found that although the plaintiff did not support the rights issue of 1994, he was not left out. The evidence showed that the plaintiff was nevertheless offered 389,760 shares in the rights issue. Furthermore, while the plaintiff may have paid the total purchase price of RM428,736 using three cheques, unfortunately, one of his three cheques was returned with remarks 'Exceed Arrangement'. The learned judge surmised this as meaning that the plaintiff's account did not have the necessary funds.

[186] The plaintiff's attempt to replace that dishonoured cheque and for an extension of time to pay the balance were unsuccessful. This culminated in the plaintiff subscribing to 208,182 shares out of 389,760 shares with the balance of 181,578 subsequently subscribed by the third defendant. It was in these circumstances that the plaintiff's aggregate and percentage shareholding was reduced from 20% to 16.27%. And, it was this reduction that was perceived as a deliberate dilution by the third to fifth defendants.

[187] The plaintiff felt he was unfairly treated, that there was a conspiracy to dilute his shares here because another shareholder, Wong was given two years to pay for his shares while he was not allowed the short extension that he sought. The plaintiff saw himself as one of the shareholders who had contributed to the success of the second defendant and that he ought to have been treated similarly like Wong. The plaintiff claimed that the third defendant's subscription of the 181,578 shares rendered him a constructive trustee of the plaintiff and that the third defendant should account to him for the profits from the 181,578 shares.

[188] The learned judge did not agree with the plaintiff, especially after evaluating the documentary evidence before the court. The evidence showed that the plaintiff's inability to subscribe to the full amount of shares offered by the second defendant was entirely due to his own oversight or his own lack of funds. Rejection under such circumstances was proper in law.

[189] The High Court also found that the plaintiff could not equate himself with Wong since Wong's position was already a matter resolved by the Board of Directors of the second defendant and the resolution had been carried at its EGM. The plaintiff also did not object to this resolution. He merely abstained from voting through his proxy. Under such conditions, the learned judge found the plaintiff's claim against the first to the third defendants, including on the basis of the third defendant as constructive trustee, unsustainable in law. The court further found the claim time-barred.

[190] As for the rights issue in 1997, the court found that the plaintiff was returned his share certificates on 9 May 1997 (exh P30), that the offer to subscribe for the rights issue was extended and still available to the plaintiff on 2 July 1997 at 5pm and later to 10 July 1997 (exh D156), and that it was due to the plaintiff's own indifference that he did not take up this rights issue. Consequently, the defendants could not be blamed for the plaintiff's dilution from 16.27% to 6.28%. The court found the claim without merit and in any event time-barred.

[191] Next, the special issue in 2004 concerned a resolution passed at the EGM of 6 August 2004 to offer to investors identified by the Board of Directors a special allotment of 4,720,000 shares in the second defendant for RM3.80 per share to be paid in cash in order to increase the second defendant's capital. The plaintiff's proxy had attended but were unable to respond to the third defendant's offer of the same. After hearing the witnesses, the learned judge found no evidence of any plot or any conspiracy. The learned judge also found the claim here time-barred.

[192] The next circumstance relied on by the plaintiff was the 2008 listing of the first defendant. An EGM of the second defendant on 15 March 2006 resolved that the second defendant would be listed by first incorporating the first defendant and thereafter all 16 shareholders of the second defendant would sell their shares in the second defendant to the first defendant and be issued shares in the first defendant in exchange. The plaintiff took part in the exercise. He received 10,745,000 shares amounting to 4.43% of the share capital of the first defendant. During the 2008 listing process, the plaintiff applied to purchase an additional 500,000 shares in the first defendant under the category of identified investor. He was allocated the shares.

[193] Subsequently, he applied to purchase another two million additional shares under the category of contributors to the success of the company, as per para 2.3(ii) and (iii) of the listing prospectus (exh P125). He was unsuccessful because all the allotted shares had been fully subscribed and the plaintiff was duly notified — see exh P135.

[194] The learned judge found the rejection of the additional two million shares 'not unreasonable' since the plaintiff's name did not appear in the list of 33 individuals as identified by the Board of Directors and mentioned in the listing prospectus. According to the learned judge, the Board was entitled to make its selection. Consequently, the plaintiff's claim in this respect was dismissed.

[195] We have carefully examined the evidence, submissions of learned counsel and reasoning of the learned judge and have found that we have no cause to intervene in the conclusions and decision reached by the learned judge. The claims here require findings of fact to be made. Such findings have been properly drawn from the oral and documentary testimonies before Her Ladyship, after having evaluated them against the pleaded case of each party and after having applied the relevant legal principles.

[196] Much of the plaintiff's complaints are indeed of the plaintiff's own doing, especially in relation to both the 1994 and 1997 rights issues. The rights issue, special issue and the listing exercise were all regularly and properly within the mandate and authority of the second defendant and its Board of Directors to make under Article 57 of the articles of association and s 132D of the Companies Act 1965. More importantly, these exercises were actions taken after valid resolutions authorising such issues had been passed at the relevant EGMs and were decisions of business judgment made by properly convened meetings of the Board of Directors and the EGMs. Such resolutions, until dissolved, cancelled or annulled are valid and binding — see *Chan Thiam Teng v Ban Swee Heng Sdn Bhd* [1992] 2 MLJ 583; *Ezzen Heights Sdn Bhd v Ikhlas Abadi Sdn Bhd (Soh Yuh Mian, intervener)* [2011] 4 MLJ 173.

[197] Even on the matter of the 2008 listing, the plaintiff is evidently not listed in the prospectus as amongst the 33 names of 'Eligible Directors and Employees of the Group and persons who have contributed to the success of the Group'. Similarly, he is not named as an identified investor by way of private placement. The fact that he was offered and that he did subscribe to the 500,000 shares under this category was satisfactorily explained by the third defendant and accepted by the court.

[198] Given such facts, the plaintiff's allegation of negligent misrepresentation in the prospectus is also unsustainable. The plaintiff had plainly not established the necessary elements for such a claim as discussed in *Khutubul Zaman @ Khutubul Jaman bin SNS Bukhari & Anor v TJB Development Sdn Bhd & Anor* [2009] 7 MLJ 314 and which had applied the principles laid down in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575, namely, that there must be a special relationship between the plaintiff and the maker of the representation; that the plaintiff relied on such

representation; and the reliance caused damage to the plaintiff.

[199] It was the plaintiff's own assumptions that caused him to think that he was eligible to subscribe for this special issue. That assumption, as we have seen, is based on his erroneous claim over the Nanyang equipment or spare parts. The evidence also shows that the plaintiff had already been paid for his two manufacturing lines by way of shares in the second defendant. It was within the prerogative and business of the Board of Directors of the second defendant to decide who would qualify or who are eligible under para 2(ii) of the listing prospectus. The plaintiff was not identified as such a person in either category in the prospectus.

[200] The plaintiff's belated complaints over all these exercises long after their completion also raise questions as to their truth, sincerity and whether such claims were at all genuine. In fact, the evidence reveal that when the plaintiff did complain on the special issue, it was two years after the exercise had been conducted.

[201] The defendants' response was readily communicated through their solicitors' letter of 26 September 2006 (exh P66), explaining their position and the reasons not unlike that pleaded in their defence to the plaintiff's claim. There was no response from the plaintiff, whether in the form of a denial or a correction; until the claim was filed. This is despite the plaintiff having legal access at all material time.

[202] It is quite evident that the trial judge had found compelling reasons not to believe the plaintiff's claim, that the proportion and reduction of his shares had absolutely nothing to do with the defendants' actions, but were entirely the result of his own acts, defaults, omissions and conscious decisions.

[203] We have no reason to disagree with Her Ladyship. The findings are supported by the evidence before the court and in accordance with sound legal principles. This is equally true in relation to the claim that there were breaches of the law under the Capital Markets and Services Act 2007 in particular, and further in respect of allegations of conspiracy against the third to the fifth defendants.

[204] It is settled law that in order to succeed in such a claim, what the plaintiff must prove depends on the precise nature of the tort of conspiracy alleged. The oft-cited decision of the House of Lords in this area of law that is, the decision in *Lonrho plc v Fayed* [1992] 1 AC 448 is well-discussed in the Singapore decision of *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2008] 1 SLR 80; and by the Court of Appeal *Renault SA v Inokom Corp Sdn Bhd & Anor and other appeals* [2010] 5 MLJ 394. See also *SCK Group Bhd &*

Anor v Sunny Liew Siew Pang & Anor [2011] 4 MLJ 393; [2010] 9 CLJ 389.

[205] Although *Renault SA* was an appeal that arose out of an application to strike out, the views expressed by the Court of Appeal are equally relevant:

> ... The gist of the tort of conspiracy is not the conspirational agreement alone but that agreement plus the overt acts causing damage (*Marrinam v Vibart* [1963] 1 QB 234, *affirmed* [1963] 1 QB 528) ... The statement of claim should describe who the several parties and their relationship with each other. It should allege the agreement between the defendants to conspire, and state precisely what was the purpose or what were the objects of the alleged conspiracy and it must then proceed to set forth, with clarity and precision the overt acts which are alleged to have been done by each of the alleged conspirators in pursuance and in furtherance of the conspiracy, and lastly, it must allege the injury and damages occasioned to the plaintiff thereby (The Common Law Library — No 5 — Precedents of Pleadings — s 26 — Conspiracy) ...

[206] Further, the Court of Appeal held that the plaintiff must prove the following elements, that there is:

> (a) an agreement between two or more persons (that is an agreement between Tan Chong and others);
>
> (b) an agreement for the purpose of injuring Inokom and Quasar;
>
> (c) that acts done in execution of that agreement resulted in damage to Inokom and Quasar;
>
> (d) damage is an essential element and where damage is not pleaded the statement of claim may be struck out.
>
> (see *Yap JH v Tan Sri Loh Boon Siew & Ors* [1991] 4 CLJ Rep 243)
>
> It is clear that the very first element to be shown must be an agreement between two or more persons for the purpose of injuring Inokom and Quasar. *'Agreement' is not limited to a signed and sealed agreement but any informal agreement, including a combination of efforts of the alleged co-conspirators*. After that, it has to be shown or at least alleged that acts were done in execution of that agreement which resulted in damage to Inokom and Quasar. In this case, the acts done would have to be unlawful, namely, the alleged false representation made by Renault to Inokom and Quasar as to the level of investment Inokom and Quasar will have to make for the Kangoo project.
>
> It is trite law that the agreement to injure must come first (in other words the agreement should have crystallised), before the alleged unlawful acts are done in execution or pursuant to the agreement. (Emphasis added.)

[207] In *Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2008] 1 SLR 80 at p 93, Judith Prakash J (as she then was) also held that in order for a claim

of conspiracy to succeed, the elements that have to be satisfied are the following:

(a) a combination of two or more persons and an agreement between and amongst them to do certain acts;

(b) if the conspiracy involves lawful acts, then the predominant purpose of the conspirators must be to cause damage or injury to the plaintiff but if the conspiracy involves unlawful means, then such predominant intention is not required;

(c) the acts must actually be performed in furtherance of the agreement; and

(d) damage must be suffered by the plaintiff.

[208] The precise nature of the tort is therefore gathered from the pleadings. The particular tort alleged will then determine the type of evidence to be led and the relevant principles to be applied.

[209] Having combed through the amended statement of claim, it would appear that the claim is premised on the tort of conspiracy by lawful means — see for instance paras 14, 15.11, 17.12, 17.13, 17.14, 19.10 and 22. In such claims, the plaintiff is required to establish that there is an agreement between two or more persons to do certain acts; the predominant purpose of that agreement is to injure or cause damage to the plaintiff, that the certain or identified acts are performed in furtherance of that agreement, and that damage from such acts were suffered by the plaintiff.

[210] The charge of conspiracy is the only allegation levied against the fourth and fifth defendants and they are alleged to have plotted with the third defendant to dilute the plaintiff's shareholding. We agree with the submissions of the fourth and fifth defendants that such pleas are, however, defective.

[211] When the particular allegations are examined, it is noted that the allegations are made in very general and broad terms about resolutions passed at EGMs of 1994, 1996, 1997, 2004 and 2006, where these defendants were in attendance and so was the plaintiff. Since the validity of these resolutions is not challenged, we cannot see how they may be used as evidence of any degree, value or probity, particularly to prove conspiracy amongst these three defendants. Further, such events span over a very substantial unaccounted period of 12 years.

[212] Other than these resolutions and the plaintiff's own say so, there is no other evidence led and certainly none that met even the balance of probabilities. The two witnesses called by the plaintiff were of no assistance in this respect, especially in the face of contemporaneous documentary evidence

in the form of the resolutions and minutes carried at the EGM. In fact, during the cross-examination of the plaintiff by the respective counsel for the fourth and fifth defendants, the plaintiff had testified that he was not pursuing the allegations against these defendants on the 2008 events; that his allegations were not made directly against them; and, he had admitted that he had not produced any evidence against the fourth and fifth defendants on the claim of conspiracy.

[213] The learned judge's findings and reasoning on this issue may be found at paras 66–75 of the judgment.

[214] Her Ladyship had found that the plaintiff had failed to produce any evidence showing that the fourth and fifth defendants played individual roles in allotting or fixing specific number of shares for the plaintiff; that these defendants had played any role in reducing the plaintiff's shares in the second defendant. On the contrary, the shares were offered for subscription based on the resolutions of the second defendant's Board of Directors.

[215] The learned judge held, and we agree with Her Ladyship, that voting in the impugned EGMs of the second defendant, whether for or against any resolution tabled, is the absolute right of the shareholders in law. Each and every shareholder is entitled to attend the EGMs and vote to protect or further their respective interests as well as that of the company. The decisions taken for the various rights issue, for the reasons, purpose and objects explained at the EGMs, done in the manner and description as proposed and executed, are properly within the power and mandates of the EGMs, as advised by the second defendant's Board of Directors.

[216] The fact that the third defendant may play a prominent role driving the second defendant and later the first defendant to corporate success, is not an unusual feature of how successful businesses come to pass. That advantage or presence is no reason to obscure the settled principles of separate corporate identity and the rule in *Salomon v A Salomon & Co Ltd* [1897] AC 22. There is certainly no basis to lift the corporate veil and pin individual liability on the third defendant as sought by the plaintiff.

[217] Returning to the allegations of conspiracy and the claims against the fourth and fifth defendants, we agree with the submissions of their counsel that these defendants are entitled to rely on the evidence before the court; that they do not necessarily have to testify personally. This is different from the case where the party makes a submission of no case to answer and elects not to lead any evidence at all. All parties before the court are entitled to rely on or challenge evidence already before the court — see *Syarikat Kemajuan Timbermine Sdn Bhd v Kerajaan Negeri Kelantan Darul Naim* [2015] 3 MLJ

609; *Guthrie Landscaping Sdn Bhd v Hasrat Usaha Sdn Bhd* [2011] 4 MLJ 121; *Tan Kim Khuan v Tan Kee Kiat (M) Sdn Bhd* [1998] 1 MLJ 697. The challenge of and reliance on such evidence may be established through the cross-examination of witnesses, other than the parties themselves. Furthermore, their counsel had cross-examined the witnesses called.

[218] We are therefore not persuaded that the learned judge had fallen into error in this respect. The learned judge had found, based on credible evidence that the plaintiff had consequently failed to discharge the requisite burden of proof that these defendants had conspired to cause loss to the plaintiff or, to injure him. We find no reason to intervene in these findings and conclusions of the learned judge which we have found to be sound, cogent and in accord with the evidence presented and the law.

[219] We also agree with the learned judge that all these claims including the claim for accounts under para 26(d) of the amended statement of claim are obviously time-barred. The factual matrix for the claim on conspiracy relate back to the events from 1994–2004. We agree with Her Ladyship that such a claim is time-barred under s 6 of the Limitation Act 1953.

[220] On the ground of limitation alone, the appeals ought and must be dismissed as the respective causes of action arose more than six years before the claim was filed.

CONCLUSION

[221] We have found no basis or reason for the exercise of our appellate powers of intervention in this appeal. The numerous findings of fact and drawing of inferences and legal conclusions accord with the evidence presented in court and the applicable principles. It would be erroneous for this court to intervene even if we may have a different view, which we do not.

[222] For all the reasons adumbrated, the appeal is dismissed with costs of RM50,000 to each respondent subject to the payment of the allocator fee. Deposit is refunded.

Appeal dismissed with costs of RM50,000, subject to payment of allocator fee.

Reported by Ashok Kumar